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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF AUSTIN, TEXAS, AND LOWER COLORADO RIVER AUTHORITY,

Petitioners

v.

DECKER COAL COMPANY, a Joint Venture; WYTANA, INC., AND WESTERN MINERALS, INC.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Terrance Lang Irion
Office of the City Attorney
P.O. Box 1088
Austin, Texas 78767
(512) 477-6511

Attorneys for Petitioner, City of Austin, Texas

C. C. Small, Jr.
(Counsel of Record)
James M. Alsup
Small, Craig & Werkenthin
2600 InterFirst Tower
Austin, Texas 78701
(512) 472-8355

Attorneys for Petitioner, Lower Colorado River Authority

QUESTION PRESENTED FOR REVIEW

Petitioners Lower Colorado River Authority and City of Austin, Texas, entered into a Coal Purchase Contract with Respondent Decker Coal Company, under the terms of which Respondent was to sell coal to Petitioners over a period of twenty-six years. The price of the coal was subject to escalation under a number of provisions, including one which increased the price where Respondent's costs were increased in order "to comply with any new legislation, regulation, judicial action (other than the codification of the common law) or labor agreement . . . enacted, promulgated, or taken or made effective after March 31, 1974." In 1976, the Department of State Lands of the State of Montana refused to permit Respondent to mine coal under a plan proposed by Respondent which called for the disturbance of

lands which were protected from disturbance under the provisions of a state statute enacted prior to March 31, 1974. As a result, Respondent developed a different mining plan which deleted the protected land and which allegedly increased its mining costs.

The sole question for review is whether the coal purchase contract between the parties permits Respondent to pass on to Petitioners and thus to the approximately 1,000,000 utility customers served by them, claimed increases in the price of coal of possibly $350,000,000, as a result of Respondent's effort to include in its original mining plan land on which mining was prohibited by law in effect prior to March 31, 1974.

LIST OF ALL PARTIES

All parties to this suit are listed in the caption of this case.

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PETITION FOR WRIT OF CERTIORARI

REPORTED OPINIONS BELOW

The opinion of the Court of Appeals is reported at 701 F.2d 420. The order on

Petition for Rehearing is reported at 705 F.2d 1448. The judgment of the District Court was not accompanied by an opinion. A copy of the judgment is attached in Appendix "B," and a copy of the Findings of Fact and Conclusions of Law is attached in Appendix "C."

JURISDICTION

This Petition for Writ of Certiorari seeks review of a judgment of the Court of Appeals for the Fifth Circuit, dated March 28, 1983, reversing and remanding a decision by the United States District Court for the Western District of Texas, Austin Division. A Petition for Rehearing was timely filed by Petitioners herein, which Petition for Rehearing was overruled by order dated May 31, 1983.

This Court has jurisdiction over this Petition for Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE

Chapter 325, Session Laws of Montana, 1973 (originally codified in Title 50, Chapter 10, RCM 1947, Section 50-1034, et seq. and presently codified as MCA, 1979, Section 82-4-201, et seq.) provides in pertinent part:

Section 9.

* * *

(2) The department shall not approve the application for prospecting or strip mining permit where the area of land described in the application includes land having special, exceptional, critical, or unique characteristics, or that mining or prospecting on that area would adversely affect the use, enjoyment, or fundamental character of neighboring land having special, excpetional, critical, or unique characteristics. For the purposes of this act, land is defined as having such characteristics if its possesses special, exceptional, critical or unique:

(a) biological productivity, the loss of which would jeopardize certain species of wildlife or domestic stock; or

> (b) ecological fragility in the sense that the land, once adversely affected, could not return to its former ecological role in the reasonable foreseeable future; or
>
> (c) ecological importance, in the sense that the particular land has such a strong influence on the total ecosystem of which it is a part that even temporary effects felt by it could precipitate a system-wide reaction of unpredictable scope or dimensions; or
>
> (d) scenic, historic, archeologic, topographic, geologic, ethnologic, scientific, cultural, or recreational significance. In applying this subsection, particular attention should be paid to the inadequate preservation previously accorded Plains Indian history and culture.

The full text of this Act is set forth in Appendix "F."

STATEMENT OF THE CASE

A. Proceedings Below.

This suit, filed by Petitioners the City of Austin, Texas, and the Lower Colorado River Authority (hereinafter

Austin/LCRA), sought a declaratory judgment construing the provisions of a contract between Austin/LCRA and Defendant Decker Coal Company (hereinafter Decker) and declaring that Austin/LCRA were not obligated to Decker for certain cost increases claimed by Decker under that contract. After trial on a stipulated record, the district court entered judgment in favor of Austin/LCRA. On appeal, the Court of Appeals for the Fifth Circuit reversed the district court's judgment (Circuit Judge Randall dissenting), and held that Austin/LCRA were obligated to pay the costs in dispute, and remanded for a determination of the amount of those costs.

B. Facts.

On October 24, 1974, Austin/LCRA, as Buyers, entered into a Coal Purchase Contract (hereinafter "the Contract") with

Decker, as Seller. (Stip. 6)[1] The coal was to be produced from leases located in the State of Montana on which a mine was to be opened and equipped with "the most modern machinery, equipment and other facilities (as determined by [Decker]) required to produce, prepare and deliver" the coal. (Ex. 1, § 5.01) The base price of the coal was to be $7 per ton f.o.b. the mine, subject to numerous escalation factors including that contained in Section 9.06, which provides in pertinent part that:

> The price of coal shall be increased from the base price in the same amount that the cost per ton of mining coal at the mine is

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1 Reference to "Stip. ___" shall be to the Stipulations of the parties dated May 1, 1981, upon which the case was tried, a copy of which is attached as Appendix "G." References to "Ex. ___" shall be to the exhibits to those Stipulations.

> increased by any direct cost or required investment in order to comply with any new legislation, regulation, judicial action (other than the codification of the common law), or labor agreement . . . enacted, promulgated, or taken or made effective after March 31, 1974.

In early 1973, more than a year prior to the critical date of March 31, 1974, the Montana Strip Mining and Reclamation Act, Chapter 325, Session Laws of Montana 1973 had become effective. (Stip. 37) The act requires a person to obtain a permit from the Montana Department of State Lands (MDSL) prior to engaging in strip mining. (Ex. 26, § 6) Under Section 9, the MDSL is prohibited from approving a permit where the land described in the application for a permit includes land having certain special characteristics as defined therein. In September of 1973, still prior to the critical date of March 31, 1974, the regulations of the MDSL

under the above statute became effective. (Stip. 39) These regulations do not add to or change the statutory definition of "special characteristics." (Ex. 28) Neither the statute nor the regulations have been amended in any way relevant to this dispute. (Stip. 37-40; Ex. 26, 27-1, 27-2, 27-3, 27-4, 27-5, 27-6, 27-7, 27-8 and 28)

During 1973, Decker had obtained a prospecting permit and had engaged in the drilling of core holes on the area where the new mine was to be opened. (Stip. 9-12) In obtaining this permit, Decker expressly assured the MDSL that the area in question included no "Section 9" land, and promised, in the event that the Section 9 characteristics were encountered, Decker would cease activities, notify the MDSL and reclaim all disturbances. (Ex. 2-2, § 2-3) In granting the prospecting

permits, the MDSL put Decker on notice that such action "in no way implies future Department approval of any area for mining." (Ex. 5)

In April of 1975, Decker filed with the MDSL an Application for a Strip Mining Permit pursuant to the Montana Strip Mining and Reclamation Act, seeking a permit for its East Decker Mine. (Stip. 17) The mining plan submitted by Decker included an area in the Deer Creek Valley. (Stip. 17)

The question of the presence in the proposed mining area of Section 9 lands was promptly raised by the MDSL. (Stip. 18-19, 21, 24, 25) In its first review of Decker's application, dated June 24, 1975, the MDSL indicated that some areas of the proposed mine might possess Section 9 characteristics. (Stip. 18, Ex. 10) By letter dated February 17, 1976, the MDSL

formally notified Decker that the proposed mining plan calling for the mining of and spoilage into Deer Creek and its flood plain was unacceptable as being contrary to Section 9. (Stip. 28)

Decker did not challenge by appeal or otherwise this action by the MDSL, but instead developed a new mining plan which was filed with the MDSL and approved in July of 1977. (Stip. 32-35) Under this plan the coal would be mined by a method which allegedly increased the cost of mining from that expected under the method proposed in the original application. (Stip. 36)

BASIS FOR FEDERAL JURISDICTION

The district court's jurisdiction was based upon diversity of citizenship, 28 U.S.C. § 1332.

ARGUMENT

I. THE COURT BELOW ERRED IN ITS CONSTRUCTION.

The matter in controversy turns on the construction to be given the language of Section 9.06 of the Contract which passes on to Austin/LCRA cost increases resulting from "any new regulation promulgated after March 31, 1974." Austin/LCRA assert that this language does not apply to mere administrative application and enforcement of pre-existing law. As used in Section 9.06, "regulation" is used synonymously with the word "rule." See DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01 at 205 (1958), which states that a "rule" and a "regulation" are interchangeable terms meaning the product of rule making. This is an ordinary and commonly used meaning of the word "regulation." See 76 C.J.S.

Regulation at 615 (1952); BLACK'S LAW DICTIONARY 1156 (5th ed. 1979); WEBSTER'S NEW COLLEGIATE DICTIONARY 966 (1979).

"Regulation" is used in Section 9.06 as one of four nouns. There are four corresponding verbs in that provision, such that when these nouns and verbs are paired, the reasonable reading of the crucial language is "legislation enacted, regulation promulgated, judicial action taken or labor agreements made effective." Read in this manner, "regulation" clearly connotes a formal rule or standard of general applicability, something much more than mere administrative application and enforcement of pre-existing law.

Applying the ordinary meaning of "new" to the language of the Contract, a "regulation" would be "new" only if its origin was after March 31, 1974. The prohibition

on the mining of "Section 9" lands originated in the 1973 statute, and constitutes the regulation resulting in the cost increase. In the absence of this statute there would have been no restraint on mining the entire area. Thus the regulation was not "new" under the terms of Section 9.06.

The characteristics of the Deer Creek Valley were not "new" either. They had been in existence for ages. All that was required was a consideration of the facts. The majority below held in effect that the area in question did not become Section 9 land until the MDSL said it did. The majority invests the MDSL with "significant discretion" (701 F.2d at 430) as to whether a particular tract of land is Section 9 land or not. Completely overlooked is the unchallenged proposition that the MDSL's decision was correct; the

Deer Creek Valley is truly Section 9 land. Decker accepted without protest or appeal this announcement by the MDSL and makes no claim that the MDSL's action was not in accord with the facts or was arbitrary or capricious. The Majority Opinion, however, implies that the MDSL could have made a different decision and could have found no Section 9 lands on the same facts. This is an unwarranted assumption. The decision of the MDSL must be accepted for what it is, a proper application of the facts to existing law. If the application had been presented to the MDSL prior to March 31, 1974, the MDSL would have made the same decision because the characteristics of the land were constant. It cannot be presumed that the MDSL would act differently on the same state of facts. The action of the MDSL in developing the facts showing that the Deer

Creek Valley was Section 9 land is simply not a "new regulation"; the regulatory restraint was there all the time, and was not of recent origin.

The majority below held that government-mandated cost increases, "like all other cost increases" are to be added to the price of the coal. (701 F.2d at 429) In essence, this construction substitutes a "cost-plus" concept which emasculates eleven pages of carefully drafted, specific price escalations. If a "cost-plus" contract was the intention of the parties, it could have been much more clearly and simply stated.

The Majority Opinion has correctly stated the intention behind Section 9.06:

> The parties' manifest intent in providing for cost increases only for "new regulation" was that the City of Austin should not bear the costs for Decker's failure to comply with existing law whether that failure was knowing, negligent or innocent.

701 F.2d at 430. In spite of this pronouncement that Decker was required to comply with existing law regardless of its knowledge or innocence, the majority below relies on "Decker's good faith belief" (701 F.2d at 430) that no Section 9 lands were in the permit area, in order to excuse Decker from the cost resulting from the presence of Section 9 lands. The parties, in negotiating the Contract, allocated the risks. Austin/LCRA agreed to pay the base price plus any increased costs resulting from changes in the rules under which Decker had to mine the coal. In return, Decker agreed to bear the risk of existing law whenever it might be applied, and regardless of whether it knew or should have known that the law might be so applied.

Decker cannot contend that it was unaware of the risk of having to comply with Section 9 at the time the Contract was executed. It had previously indicated in its application for a prospecting permit that should any Section 9 lands be encountered, it would cease prospecting, thus, acknowledging the fact that Section 9 lands might well be included in the area. Similarly, Decker had been expressly forewarned by the MDSL that issuance of the prospecting permit in no way implied future Department approval of any area for mining. Decker was aware of the statutory requirements. It had ample opportunity to inspect the land and make inquiries of the MDSL if it wished advanced warning of the Department's decision. Austin/LCRA, on the other hand, were not in any position to evaluate this risk, and thus were not in a position to

accept its burden. Austin/ LCRA merely contracted to buy coal. The exact location of the mine and the method of operation were left entirely to Decker. Just as Decker was charged with the responsibility of developing a workable mine, so too was it charged with ensuring that its operations conformed with existing law. Any other construction grants to Decker the benefit of locating the mine and operating in any fashion it pleased, while placing on Austin/LCRA the burden of paying if Decker's choices did not comply with existing law. Such an irrational and improbable construction should be avoided. Davis v. Park Securities Corporation, 159 P.2d 323, 326. (Mont. 1945).

The approach adopted by the Court below introduces into the Contract a total lack of precision and predictability. By introducing the elements of "significant

discretion" and ability to predict the decision, the majority opens the door for a flood of future disputes between the parties as the MDSL and other administrative agencies such as the Environmental Protection Agency apply and enforce pre-existing statutes and regulations. It is inconceivable in light of the tremendous detail with which the Contract as a whole was written that the parties could have intended such a result. A much more reasonable and probable interpretation of Section 9.06 would limit the inquiry to an objective determination of when a formal regulation was promulgated, or at the very most, when it became effective.

Finally, the majority below has ignored Montana law regarding the interpretation of a contract. Under the provisions of 28-3-206, MCA, 1979, where

uncertainty exists, the language of a contract is to be most strongly interpreted against the party who caused the uncertainty to exist. The rule is qualified by the following language:

> The promisor is presumed to be such party [who caused the uncertainty to exist], except that in the case of a contract between a public officer or body, as such, and a private party, it is presumed that all uncertainty was caused by the private party.

The record is silent as to who caused the uncertainty to exist in the present case, but it is stipulated that Austin/LCRA are public bodies and Decker is a private party. Under these circumstances, the contract should be construed against Decker and in favor of Austin/LCRA.

II. THE MAJORITY OPINION ERRED IN MAKING FINDINGS OF FACT WITHOUT REMAND TO THE DISTRICT COURT.

Even if the Majority Opinion's construction of Section 9.06 were correct, it erred in making findings of fact without a

remand to the district court. The construction given still leaves open the question of whether the MDSL's action "involved significant discretion and fact-finding and which could not have been known prior to such determination." Without any real development of this fact issue in the record, but relying on matters outside the record,[2] the Majority Opinion found that Decker could not have anticipated the MDSL's decision. Given

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2 The opinion of March 28, 1983, relied heavily upon information not part of the stipulated record, but contained in Decker's self-serving Answers to Interrogatories which were never introduced into evidence. In the May 31, 1983, order, the Court below acknowledged its error in this regard, although it erroneously asserted that the Stipulations contained matters which supported this conclusion.

the evidence from which conflicting inferences could be drawn, such as the warnings to Decker that approval might be withheld and the possibility of prior consultation with the MDSL, this fact issue should be remanded to the district court. See WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 2577 at 697-702 (1971).

III. THE CONTRACT MAY BE AMBIGUOUS.

Four judges have examined the contract in question and the stipulated facts and all four unequivocably have found there is no ambiguity in the contract and that it can be comfortably construed from its four corners. In spite of this unanimity, the four judges have split two to two as to the proper construction of the contract and have reached diametrically opposite conclusions. This indicates the strong

possibility of ambiguity, because unambiguous language should not be susceptible of two such differing constructions. If the contract is ambiguous, the case should be remanded to the district court for consideration and construction in that light.

IV. EXCEPTIONAL IMPORTANCE OF THE ISSUE.

The issue presented in this case is of extreme importance. Its resolution will have a significant impact on the electric utility rates of the approximately 1,000,000 people who are served either directly or indirectly by the City of Austin or the Lower Colorado River Authority.[3] Not only does the decision

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3 In addition to the more than one hundred thousand people served by the City of Austin, the LCRA itself presently serves nearly 1,000,000 people in 41 Central Texas counties. Residents of the cities of San Marcos, San Saba and Kerrville are directly served by the LCRA.

in this case affect a huge number of people, the dollar impact is equally great. The amount in immediate controversy exceeds $85.5-million which is based upon $1.71 per ton presently claimed by Decker to be the cost increase resulting from the MDSL's actions, or a 24.4% increase over the $7.00 base price of the coal. The cost to Austin/LCRA will further be increased by the 30% severance tax levied by the State of Montana for a total out-of-pocket cost to Austin/LCRA of more than $111.2-million. In addition, there will be almost certain increases in the disputed costs due to inflation over the life of the Contract, in which case the

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3 The LCRA provides electrical power to all electrical cooperatives and 30 cities which in turn provide this power to the residents in their area.

total out-of-pocket cost to Austin/LCRA could easily exceed $350,000,000.

This decision will have important precedential effects. The Majority Opinion of the Court of Appeals has established a construction of the language of Section 9.06 which will govern the parties' rights and obligations during the remaining twenty plus years left on the Contract. Countless opportunities will exist for further cost increases to be claimed by Decker, thus, multiplying the already staggering sum directly involved in this decision. The Majority's holding that "regulation" means all "administrative determinations which involve significant discretion and fact-finding and which could not have been known prior to such determination" (701 F.2d at 430), will result in continuous controversy between

the parties with respect to future "administrative" actions. Consider for example the provisions of Section 11 of the Montana Strip Mining and Reclamation Act (attached as Appendix "F"), which requires in subsection (1) that the "area of land affected shall be restored to the approximate original contour of the land." Should a dispute arise between Decker and the MDSL over the sufficiency of Decker's future restoration of the mine area, will Austin/LCRA be required to pay for this as an additional cost under Section 9.06? The same problem exists with any number of pre-existing statutory requirements imposed upon Decker's operations. When Decker is required by administrative directive to comply with pre-March 31, 1974 laws and regulations the majority would require Austin/LCRA to pay the bill.

In addition, disputes now exist between Decker and Commonwealth Edison (which serves Chicago and the northern half of Illinois) and Decker and Detroit Edison (which serves Detroit and the southern half of Michigan) over the application of similar provisions of the contracts under which these companies purchase coal from Decker. The Detroit Edison dispute has recently ripened into litigation. CA-83-CV-1134-DT, Detroit Edison Co. v. Decker Coal Co., Eastern District of Michigan, Southern Division, filed March 29, 1983; CA-83-74-BAL6, Decker Coal Co. v. Detroit Edison Co., District of Montana, Billings Division, filed March 30, 1983. Not only do these disputes involve the MDSL's application of Section 9, the Detroit Edison litigation also involves cost increases claimed by

Decker for acts of the MDSL taken in connection with Decker's mining and reclamation activities of the type discussed in the preceeding paragraph. The precedential effect of the Court of Appeals' decision will affect the rights of the utility customers residing in areas served by those two companies.

The Dissenting Opinion below accurately characterizes the result of the Court of Appeals' decision:

> . . . in order to remedy a mistake made by a Montana coal company in assessing the possible impact of the Montana statutory and regulatory scheme on its mining plan, the majority has, in effect, saddled the already overburdened utility customers served by the City of Austin and the Lower Colorado River Authority with a $50 million judgment[4] representing a fourteen percent increase over what the parties agreed to as the cost of the coal.

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4 This $50-million figure was an estimate given the Court of Appeals in oral argument. As discussed above, the true amount in controversy may well exceed $350,000,000.

701 F.2d at 438. To this list of overburdened customers affected by this decision should be added those served by Commonwealth Edison and Detroit Edison.

CONCLUSION

The majority of the Court of Appeals erred in reversing the decision of the District Court. This Petition for Writ of Certiorari should be granted, the Court of Appeals' judgment reversed and the district court's judgment affirmed.

Respectfully submitted,

Terrence Lang Irion
CITY ATTORNEY'S OFFICE
P.O. Box 1088
Austin, Texas 78767

Attorneys for Petitioner
City of Austin, Texas

C. C. Small, Jr.*
James M. Alsup
SMALL, CRAIG & WERKENTHIN
2600 InterFirst Tower
Austin, Texas 78701

Attorneys for Petitioner
Lower Colorado River
Authority

*Counsel of Record

August 29, 1983

APPENDIX A

Opinion of United States Court of Appeals, Fifth Circuit, in Cause No. 81-1618, dated March 28, 1983

City of Austin, Texas and Lower Colorado River Authority, Plaintiffs-Appellees,

v.

Decker Coal Company, a Joint Venture, Wytana, Inc. and Western Minerals, Inc., Defendants-Appellants.

No. 81-1618

United States Court of Appeals, Fifth Circuit

March 28, 1983.

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, RANDALL and JULLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge

I. INTRODUCTION

This case comes before this court from a decision by the district court for the Western District of Texas, Bunton, J., in favor of the plaintiffs--the City of

Austin, Texas and the Lower Colorado River Authority.[1]

We are presented with a question of allocation of costs under a coal procurement contract entered into between the plaintiffs and Decker Coal Company.[2] Specifically, the issue involved is whether, pursuant to the contractual provision allowing Decker to pass costs on to the plaintiffs for "any new legislation, regulation, judicial action . . . or labor agreement . . . enacted, promulgated, or

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1 Lower Colorado River Authority is a conservation and reclamation district created by Texas law. Its principal offices are located in Travis County, Texas.

2 Decker Coal Company is a joint venture comprising Wytana, Inc., a Delaware corporation with principal offices in Nebraska, and Western Minerals, Inc., an Oregon corporation. Its principal offices are located in Sheridan, Wyoming. The coal mine is located in south-central Montana, near the Montana-Wyoming state-line.

taken or made effective after March 31, 1974," Decker could pass through cost increases resulting from a 1976 determination by the Montana Department of State Lands [hereinafter, "MDSL"], pursuant to a pre-1974 Montana statute, which precluded "disturbance" of a certain portion of land within the proposed mine area.[3]

[1] Because we find, based on an interpretation of the entire contract as required by Montana law,[4] that the

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3 This case was bifurcated by the district court into liability and damage determinations. Because the court found that the contract did not allow pass-through of the costs in question, a determination of damages was not necessary. The parties stipulated that Decker's costs of mining were increased as a result of MDSL's permit restriction.

4 Mont.Code Ann. § 28-3-202 (1979). Jurisdiction in district court was based on diversity under 28 U.S.C. § 1332. Under Texas's choice-of-law rules, the contractual choice-of-law applies. See Austin Bldg. Co. v. National Union Fire Ins. Co., 432

parties intended to allow pass-through of costs resulting from governmental action such as was involved here, we reverse the decision of the court below and remand for a determination of increased mining costs chargeable to the plaintiffs.

II. MOTION FOR CERTIFICATION

[2] We note at the outset that Decker has filed a Motion for Certification to the Montana Supreme Court of the single issue involved herein. We hereby deny that motion.

Our decision not to certify the issue is based on the logic set forth in Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 274-76 (5th Cir. 1976), and on the traditional use of certification. If this case turned on Montana's definition of "regulation" or other terms about which

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4 S.W.2d 697, 701 (Tex. 1968). Article 16.01 of the contract provides that Montana law governs its construction.

the Montana court possessed expertise, this would be a different case. As we discuss below, however, we base this decision on a determination of intent as manifested by the contract. Because we are as capable of making that determination on the basis of the record as is Montana, we will do so.[5]

III. FACTS

A. The Contract

In an effort to meet growing energy demands, the plaintiffs, City of Austin and Lower Colorado River Authority, formed jointly the Fayette Power Project. Included in the project's plans were an electric generation station with one 600-megawatt

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5 We note that in Shevin the court specifically stated, that "considerations [in favor of certification] are more applicable in this case [involving suit brought by the Florida attorney general under state statute] than in one involving, for example, the interpretation of a clause in an insurance contract." 526 F.2d at 275.

unit and other units with a variety of coal-burning capabilities.

On October 24, 1974, the plaintiffs entered into the Coal Purchase Contract with Decker. Under the contract, coal deliveries were scheduled to begin in 1978 and to continue for approximately 26 years, until 2003. Over the course of the contract over 50 million tons of coal are to be delivered.[6]

The contract established a "base price" of $7.00 per ton as of March 31, 1974. Numerous price adjustment mechanisms were built into the contract, primarily in article IX, which is a detailed enumeration of adjustment factors, covering 11 pages. The pertinent clause within

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6 Despite this contract dispute, the parties continue to operate under the agreement, and coal shipments are continuing.

article IX of the contract is paragraph 9.06:

> ADDITIONAL COSTS IMPOSED BY LEGISLATION REGULATION, JUDICIAL ACTION, LABOR AGREEMENT, OR CHANGES IN THE METHOD OF OPERATION DUE TO MATERIAL SHORTAGES
>
> The price of coal shall be increased from the base price in the same amount that the cost per ton of mining coal at the Mine is increased by any direct cost or required investment in order to comply with any new legislation, regulation, judicial action (other than the codification of the common law), or labor agreement which provides for new "add-ons" or additional personnel . . . enacted, promulated, or taken or made effective after March 31, 1974.

B. The Mine

In July 1973 Decker filed an Application for Prospecting Permit with MDSL for exploration by rotary drill holes in Big Horn County, Montana. The site, known as "East Decker," is east of the Tongue River Reservoir directly across from another Decker mining area, dubbed "West Decker."

Decker had acquired a perpetual coal lease for this area in September 1971.

The East Decker site lies, in part, within the Deer Creek floodplain, through which Deer Creek flows on its way to Tongue River Reservoir. Deer Creek has a drainage area of approximately 50 square miles and its floodplain contains riparian timber, shrub habitat and significant wildlife.

Decker's permit application specified the acreage to be disturbed, the method of prospecting, the mineral sought, and included a Detailed Prospecting Reclamation Plan with maps. In its reclamation plans, Decker stated: "2. The Company assures the Department of State Lands that the area covered by the application for prospecting permit includes no land having special, exceptional, critical, or unique characteristics as defined in Section 9(2)

(a, b, c, d) Chapter 325, Laws of Montana 1973."[7]

Decker went on to say that based on interviews with local residents of the community, no "archaeological, historical, ethnological and cultural values" would, to Decker's knowledge, be affected. Nor would the "use, enjoyment, or fundamental character" or neighboring lands with such characteristics be adversely affected. Decker promised MDSL that should any characteristics of "Section 9" lands be encountered it would cease prospecting, notify MDSL immediately, and reclaim all disturbances within the area having those characteristics.[8] The Application for Prospecting Permit and appended Detailed

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7 Exhibits 2-1 and 2-2 to Docket Entry 38. The lands possessing such characteristics are referred to hereinafter as "Section 9" lands.

8 Id.

Prospecting Reclamation Plan were filed as required by the Montana Strip and Underground Mine Reclamation Act, 1975 Mont. Laws ch. 441, sec. 14, and by the regulations adopted by MDSL pursuant thereto, Mont.Admin.Code §§ 26-2.10(10)-S10270 to -350 (1973).[9]

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9 The act was amended in 1979 and is now found at Mont.Code. Ann § 82-4-201 et seq. (1979). Section 9 of the 1973 act, 1975 Mont. Laws ch. 441, sec. 21, provided:

> (2) The department shall not approve the application for a prospecting, strip mining or underground mining permit where the area of land described in the application includes land having special, exceptional, critical, or unique characteristics, or that [sic] mining or prospecting on that area would adversely affect the use, enjoyment, or fundamental character of neighboring land having special, exceptional, critical, or unique characteristics. For the purposes of this act, land is defined as having such characteristics if it possesses special, exceptional, critical or unique:

On July 23, 1973, MDSL issued Decker a permit allowing Decker to prospect on the

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9 (a) biological productivity, the loss of which would jeopardize certain species of wildlife or domestic stock; or

(b) ecological fragility, in the sense that the land, once adversely affected, could not return to its former ecological role in the reasonable [sic] foreseeable future; or

(c) ecological importance, in the sense that the particular land has such a strong influence on the total ecosystem of which it is a part that even temporary effects felt by it could precipitate a system-wide reaction of unpredictable scope or dimensions; or

(d) scenic, historic, archaeologic, topographic, geologic, ethnologic, scientific, cultural, or recreational significance. In applying this subsection, particular attention should be paid to the inadequate preservation previously accorded Plains Indian history and culture.

Throughout the reclamation plan, Decker made repeated references to ecological and environmental concerns.

lands in question, according to the procedures and assurances which it had set forth in its permit application. This permit was reissued on September 21, 1973, and renewed on September 20, 1974. In the 1974 renewal MDSL stated that the permit "in no way implies future Department approval of any area for mining," and attached a MDSL letter spelling out the requirements vis-a-vis the nearby Tongue River Reservoir so that no water pollution should occur.[10]

Finally, on April 9, 1975, Decker submitted an application for a strip mining permit to MDSL. Included in the application was a proposal to place "overburden" and spoil materials into the Deer Creek floodplain, to divert Deer Creek from its original channel, and to affect

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10 Exhibits 8-1 and 8-2 to Docket Entry 38.

Deer Creek drainage in other ways. Decker submitted archaeological, ecological and topographic data with the application and stated that the area did not encompass any "Section 9" lands. Appended to the application was a 1973 "Historic and Archaeologic Resources Impact Appraisal" which included an evaluation of the proposed mining area. According to Decker, this report, prepared by Western Interpretive Services, indicated "a low probability of the area" possessing special characteristics as set forth in Section 9.[11]

C. The Problem

Pursuant to its statutory[12] and

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11 Exhibit 9-1 to Id. The Western Interpretive Services report was not included with the record before either this court or the district court.

12 1975 Mont. Laws ch. 441, sec. 21 provided:

> An application for a prospecting, strip mining or underground mining

regulatory requirements,[13] MDSL had begun its process of determining whether Decker's proposed mining plan would adversely affect any lands that had the characteristics required for "Section 9" classification. This analysis began at least as early as February 1, 1974. Over the next 2 years, MDSL conducted extensive investigations to make this determination. As set forth in Decker's response to plaintiff's interrogatories, at least 15

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12 permit shall not be approved by the department if there is found on the basis of the information set forth in the application, an on-site inspection, and an evaluation of the operation by the department that the requirements of the act or rules will not be observed or that the proposed method of operation, backfilling, grading, subsidence stabilization, water control, highwall reduction, topsoiling, revegetation, or reclamation of the affected area cannot be carried out consistent with the purposes of this act.

13 Mont.Admin.Code § 26-2.10(10)-S10270 (1973).

meetings were held with MDSL officials to discuss the problems MDSL perceived insofar as whether the lands affected had the characteristics described in Section 9.

In February 1976, MDSL determined that portions of the mining area did possess "Section 9" characteristics.[14] Subsequently, in March 1976, MDSL established a tentative "non-disturbance" line which essentially provided that the Upper Deer Creek floodplain could not be disturbed, but which allowed disturbance of the Lower Deer Creek floodplain. This line was

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14 Specifically, MDSL found that the Deer Creek floodplain contained "special values in terms of biological productivity and as critical in terms of ecological fragility and importance" and would be adversely affected by the proposed mine. Further, MDSL determined that Tongue River Reservoir, which possessed special characteristics, would also be adversely affected. Letter from C.C. McCall, Administrator, MDSL Reclamation Division, to Jack Reed, Decker Coal Company (Feb. 17, 1976).

established finally in April 1977 and was presumably based on a decision that the Upper Deer Creek floodplain was "Section 9" land and that the Lower Deer Creek floodplain was not.

As a result of this determination, Decker had to revise its proposed mining plan to avoid disturbance of the protected area. After nine additional meetings to consider the "Section 9" problem, and after submission of three proposed mining plans by Decker, MDSL approved a plan on July 13, 1977, which replaced the use of draglines with a truck-and-shovel mining method. This plan, as determined by MDSL, eliminated the deposit of "overburden" or other disturbance in the Upper Deer Creek floodplain.

Unfortunately, as stipulated by the parties, the substitute method increased the costs of mining.[15]

All of which brings us back to the only issue which concerns us: Was the action taken by MDSL in February-March 1976 in classifying the Upper Deer Creek floodplain as "Section 9" land and in establishing the non-disturbance line a "new . . . regulation . . . enacted, promulgated or taken or made effective after March 31, 1974," as contemplated by the contract?

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15 The tentative estimate of the parties is that the increase amounted to approximately $1 per ton, or $50 million over the life of the contract. Whether this is accurate or not remains to be seen, as do other considerations in the determination of damages.

IV. DETERMINATION

A. Standard of Review

In the Findings of Fact and Conclusions of Law entered pursuant to its judgment, the district court held that the contract is "unambiguous on its face" and that the term "new . . . regulation . . . does not apply to mere enforcement of regulations already existing." The court found for the plaintiffs and awarded them some $10.1 million, which had been the stipulated amount of damages should the plaintiffs prevail on the liability portion of the case.[16]

Our initial question in reviewing this dispute concerns the correct standard of review.

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16 The $10.1 million represents the payment by the plaintiffs for incremental costs resulting from Decker's change in the method of mining, plus prejudgment interest.

This circuit, in conformity with other circuits, has consistently held that the interpretation of a contract "is a matter of law reviewable de novo on appeal." Matador Drilling Co., Inc., v. Post, 662 F.2d 1190, 1197 (5th Cir. 1981). See also Eaton v. Courtaulds of North America, Inc., 578 F.2d 87, 90 (5th Cir. 1978). The stated and logical reason for de novo review is that "this Court is in as good position to interpret the . . . written contract as was the district court." Illinois Central R.R. v. Gulf, Mobile & Ohio R.R., 308 F.2d 374, 375 (5th Cir. 1962).

[3] This broad standard of review includes the determination of whether the contract is ambiguous. This initial determination is, equally with other aspects of contract interpretation, a question of law. In re Stratford of

Texas, Inc., 635 F.2df 365, 368 (5th Cir. 1981).

We must keep in mind that "'[c]ontracts are not rendered ambiguous by the mere fact that the parties do not agree upon their proper construction'," Freeman v. Continental Gin Co., 381 F.2d 459, 465 (5th Cir. 1967) quoting Whiting Stoker Co. v. Chicago Stoker Co., 171 F.2d 248, 250-51 (7th Cir. 1948).[17]

[4] With this caveat in mind, and mindful of the prescriptions of Montana law which govern contract interpretation; we find the contract unambiguous, as did the lower court, but find that the contract evidences an intent that a determination of the type made by MDSL in February-

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17 By the same token, the fact that courts may disagree as to the import of a contract term does not, by that fact alone, mean that it is ambiguous.

March 1976 comprised a "new . . . regulation" within the meaning of the contract.[18]

B. Contract Interpretation Under Montana Law

[5, 6] Turning to Montana law, we note initially that courts are to give effect to the mutual intent of the parties which existed at the time of contracting, "so far as the same is ascertainable and lawful."[19] That intent "is to be ascertained from the writing alone if

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18 The determination of the parties' intentions, as revealed solely by the contract, is but another form of contract interpretation, and therefore constitutes a question of law. Only when the contract is ambiguous does determination of the parties' intent involve a question of fact. Fujimoto v. Rio Grande Pickle Co., 414 F.2d 648, 654 (5th Cir. 1969). Having found the contract neither patently nor latently ambiguous, it is therefore appropriate for us to interpret the contract in its entirety to determine intent.

19 Mont.Code Ann. § 28-3-301 (1979).

possible."[20] The entire contract is to be looked to in determining intent[21] and "[t]he words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning unless used by the parties in a technical sense. . . ."[22]

[7] Our task is to look to the entire contract and "to give effect to every part if reasonably practicable, each clause helping to interpret the other."[23] We are bound by the contract and may not reconstruct it by outside reference.

C. The Contract

The City of Austin argues that the action taken by MDSL did not constitute

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20 Id. § 28-3-303 (1979) (emphasis added).

21 Id. § 28-3-202. See Rumph v. Dale Edwards, Inc., 183 Mont. 359, 600 P.2d 163, 168 (Mont. 1979).

22 Id. § 28-3-501.

23 Id. § 28-3-202.

"new . . . regulation" within the meaning of the contract for two reasons. First, the action was not "new" because the statute prohibiting mining operations on Section 9 lands was in effect prior to "the critical date," i.e., March 31, 1974, "and this statute constituted the regulation . . . ." Second, the City of Austin argues that MDSL's action was merely administrative enforcement of an existing regulation and was not itself a "regulation" within the meaning of the paragraph 9.06.

Decker argues that the action taken in February-March 1976 establishing Upper Deer Creek floodplain as "Section 9" land and precluding mining activity on that land was both "new," i.e., occurring after March 31, 1974, and a form of "regulation" within the meaning of paragraph 9.06.

In order to determine the intent of the parties in the creation of paragraph 9.06, an analysis of the relevant sections of the contract is required.

The prefactory language provides that the purpose of the contract is to provide "an assured and dependable supply of low sulphur coal. . . ."

Article I states simply that Decker owns leases from which the coal shall be mined. At the time of execution of the contract, Decker "is planning to open the Mine."

Article II provides a twenty-six year contract term with delivery to commence sometime between January 1 and September 30, 1978.

Article III provides that, during the term of the contract, between 51.6-56.7 million tons of coal are to be delivered.

Article IV specifies the quality of the coal, with an approximate average per pound "heat content" of 9,200 BTU. A reduction of 50¢ per ton from the "then-current price" is provided for usable coal with less than 9,000 BTU per pound.[24]

Article V provides that Decker will install "the most modern machinery, equipment and other facilities," that it will operate the machinery in order to produce the coal efficiently and economically, and that the machinery, equipment and facilities will be acquired by Decker "with its own capital."

Article VIII provides a "base price" of $7.00 per ton, subject to adjustments provided in Articles IV and IX.

Article IX contains the major price adjustments and is discussed below.

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24 Adjustments are provided to compensate for deviations from the 9,200 BTU level in paragraph 9.09.

Article XI is the force majeure clause.

Article XV provides that the City of Austin can discontinue acceptance of delivered coal when its sulphur content exceeds or its BTU content falls below article IV requirements for any two consecutive months.

The remaining portions of the contract cover such matters as billing, severability, accountants' reports, waivers and notices, and nondiscrimination in employment.

Article IX comprises the principal price adjustment clause in the contract. It covers eleven pages and provides eleven categories of price changes. The article IX paragraph, adjustment factor, base figure, base date, adjustment basis and party benefited are as follows:

Contract Paragraph	Adjustment Factor	Base Figure	As Of	Adjustment Based On	Party Benefited
9.01	Materials and Supplies	$1.06	3-31-74	BLS Statistics (composite of monthly Wholesale Price Index for Construction Machinery and Equipment and for Metals and Metal Products	Both
9.02	Labor, Salaries and Related Costs	1.35	3-31-74	Weighted Average Hourly Rate for Labor Based on Labor Classification Schedule	Both
9.03	Costs Based on Values such as ad valorem, production, severance, and real estate taxes	.23	3-31-74	Actual Costs (when coal is mined)	Both
9.04(1)	Costs Based on Extraction (such as royalty, pension plan payments)	.635	3-31-74	Actual Costs	Both
9.04(2)	Other Costs for the Right to Mine (payments by seller for surface damage	No Base	3-31-74	Actual Costs	Decker
9.05	Other New, Increased Taxes	No Base	3-31-74	Actual Costs	Both
9.06	Additional Costs Imposed by Legislation, Regulation, Judicial Action, Labor Agreement or Changes in Method of Operation due to Material Shortages	No Base	3-31-74	"Any direct cost of required investment in order to comply with any new legislation, regulation judicial action (other than codification of the common law) or labor agreement ... enacted, promulgated, or taken, or made effective after March 3, 1974."	Decker
9.07	Transfer Taxes (such as sales and use taxes)	No Base Specified	None	Actual Cost	Decker
9.08	Composite Adjustment in the various items making up the total base price which are not otherwise provided for in §§ 9.01, 9.02, 9.08 and 9.04(1)	50% of 3.575 (1.7875)	3-31-74	Multiply by % increase or decrease in weighted average hourly wage rate (par. 9.02)	Both
		50% of 3.575 (1.7875)	3-31-74	% increase of decrease in BLS Wholesale Price Index for Construction Machinery and Equipment (par. 9.01)	Both
		.15	3-31-74	% increase or decrease in consumer price index	Both
9.09	Quality Adjustment	No Base Specified		% variation from prescribed specifications	Both
9.10	Price Controls	No Base Specified		Reduce Price if Unlawful	Austin

The contract provides that article IX adjustments be made quarterly. Thus, in the first quarter of actual mining, adjustments for 1974-1978 would be made. This price would in turn be revised each quarter.[25]

In analyzing the effect of these various elements of the contract, we turn first to the question presented by a reading of article V, providing that "Seller agrees that the machinery, equipment and facilities provided by it shall be acquired with its own capital." It is urged that this required Decker to absorb all start-up costs and prohibited its passing on to the City of Austin cost increases resulting from interim government-mandated mining changes.

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25 It should be noted that the sum of the "base figures" is $7.00, the "base price."

There are critical flaws in such an analysis. First, the most obvious difficulty is that, if the parties did not intend interim government-mandated cost increases to be added to the price of coal, March 31, 1974, would not have been designated as the base date in paragraph 9.06; rather the start-up date would have been used. Second, although the exact nature of the government-mandated increases with which we are dealing remains to be elucidated, some of those increases undoubtedly bear on the various elements which comprise the $7.00 base price, viz; materials, supplies, labor and so forth. Clearly under the contract interim increases in those costs are to be added to the price of coal. There is no evidence reason why other interim cost increases, although mandated by the government, should

be treated any differently.[26] Third, the critical word in article V is "acquire." This implied that Decker was to obtain and make the initial payments for machinery, equipment and facilities. To "acquire" means "to gain possession of;" it does not imply that Decker was to bear the ultimate cost.

We grant that the costs which might result from MDSL's actions could affect the "start-up" costs. That paragraph 9.06 intended to cover such costs, however, is evidenced by its broad language, i.e., "The price of coal shall be increased from the base price in the same amount that the cost per ton of mining coal at the Mine is increased by any direct cost or required

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26 For example, had Montana adopted a new tax during the interim period which was covered by paragraph 9.05, this would be adjusted for in the price of the coal.

investment. . . ." The contract goes on to discuss the computation method for a "capital investment" required under paragraph 9.06. There is no distinction made between pre- and post-start-up costs or investments.

In our view, article V constitutes essentially boilerplate language which, when read in conjunction with article VIII and article IX, requires simply what it states--Decker was to use its own capital in purchasing equipment and facilities in the start-up of the mine. These capitalization costs were factored into the base price, and interim changes in these costs provided in paragraph 9.06 required per ton price adjustment just as did any other cost changes.

The $7.00 "base price" was primarily that--a basis. It was never intended to

be the actual price for the coal.[27] As indicated by the fact that it was dated some four years before actual delivery, this base price is more important in its function as a gauge for future adjustments than as a price.

It is true that no base figure and no defined schedule is provided for applying cost increases under paragraph 9.06. This does not render it an abstraction, however. "Any direct cost or required investment" was to be factored into the price of the coal. Of course the price could not be

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27 The parties knew that when delivery actually began the price would likely be much higher. Thus, in paragraph 9.09, an illustrative price of $16.00 per ton is used in discussing quality adjustment. Throughout the contract terms such as "then current price" (article IV) or "current sales price" (article XI) are used. The breakdown of the base price into its various components, each with its own price factor, indicates the significance of the $7.00 "base price" as a base rather than as a price.

adjusted until mining and deliver of coal began--until then there would be no "price" --but it was to be based on events which occurred after March 31, 1974.[28]

[8] In short, adjustment is provided for all other interim cost increases; interim increases required by governmental action are not treated any differently under the terms of the contract itself. If we are to give effect to every part of the contract,[29] we must conclude that qualified, interim government-mandated cost increases were to be treated like all other cost increases and added to the price of the coal.

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28 As in the case of paragraph 9.07, paragraph 9.06 is speculative in nature and merely seeks to clarify a possible eventuality. An accurate "schedule" for such an unknowable, future occurrence contradicts the very uncertainty with which the parties were concerned.

29 Mont.Code Ann. § 28-3-302(1979).

This brings us to the next step in our analysis: Whether the actions by MDSL were "new . . . regulations" within the meaning of paragraph 9.06.

We start with the premise that under Montana's guidelines for contract interpretation we are to view the words "new regulation" in "their ordinary and popular sense rather than according to their strict legal meaning unless used by the parties in a technical sense. . . ."[30]

The City of Austin argues in this regard that the word "regulation" was indeed used in a "technical sense" in that the four types of activity listed in paragraph 9.06--"legislation, regulation, judicial action (other than codification of the common law), or labor agreement"--were deliberately matched with the four verbs

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30 Id. § 28-3-501.

which follow--"enacted, promulgated, or taken or made effective." The City of Austin argues that read thus it is patent that only "regulations . . . promulgated" after March 31, 1974, qualify as "new regulations."

We are not persuaded that there is such a careful pairing of noun and verb as to allow a technical reading of this contract clause. Legislation can be "enacted" or "promulgated" on one date and "made effective" on another date. The same is true for regulations. A labor agreement can be "promulgated" on one date and "made effective" on another date. So, in rare instances, a judicial decision may be "taken" and "made effective" on different dates.[31]

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31 See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., ____ U.S. ____, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (effective date of decision

Read in consonance with the entirety of article IX, which provides that all components in the price will be adjusted to reflect costs, we read this contract language as an informal recitation covering the "three branches" of government. We interpret this language as the parties essentially saying, "Here are the elements which make up the cost of mining coal. If, subsequent to March 31, 1974, the government takes new judicial, legislative or administrative actions which increase those costs, those increases will be treated the same as any other increases covered by the contract."

We cannot say that the parties intended that "new regulation" would require formal regulatory action under Montana's administrative procedure act. Rather, we believe

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31 delayed from June 28, 1982, until October 4, 1982).

the parties meant to use the term in its "ordinary and popular sense."[32]

The parties' manifest intent in providing for cost increases only for "new regulation" was that the City of Austin should not bear the costs for Decker's failure to comply with existing law whether that failure was knowing, negligent, or innocent. Decker negotiated a base price and was not allowed to turn around and escalate that price because of legal requirements of which it should or could have known.

As the facts indicate, however, MDSL's action was not mere ministerial enforcement of a clear prohibition of the use of the

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32 Thus interpreted, "regulation" includes not only formal rule-making procedures and edicts but also administrative determinations which involve significant discretion and fact-finding and which could not have been known prior to such determination. To illustrate, writing a parking ticket does not qualify as regulation.

land in question.[33] Decker's good faith belief in the truth of the statements made in its initial application, previously referred to, is not in question. As we have noted, Decker stated: "The Company assures the Department of State lands for the area covered by the application for prospecting permit includes no land having special, exceptional, critical, or unique characteristics as defined in Section 9(2)(a, b, c, d) Chapter 325, Laws of Montana 1973." The factual determination as to whether any part of the land affected by the mining operation was "Section 9" land took over two years to reach. When that determination was made only the Upper Deer Creek floodplain was so classified.

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33 It is noteworthy that the regulations enacted pursuant to the statute do not clarify the characteristics of "Section 9" land but merely refer to the statute itself. Mont.Admin. Code § 26-2.-10(10)-S10270(4)(C) (1979).

Numerous conferences and on-site visits were required. Innumerable telephone calls and correspondence centered on this question.

Significant discretion was involved in MDSL's action. Their determination could not have been known beforehand by Decker, could not have been factored by the parties into the contract, and, consistent with the language and intent of the contract, therefore constitutes "new regulation."

The City of Austin states in its Post-Submission Brief that the action by MDSL not only was not "regulation" as intended by paragraph 9.06 but also was not "new" because "the statute prohibiting mining operations on Section 9 land was in effect prior to the critical date and this statute constituted the regulation which resulted in the increased cost." That statute had never been deemed application to the Deer

Creek Valley area, however. MDSL's action thus constituted "new regulation." The fact that the statute upon which the regulatory action was based pre-dated March 31, 1974, no more disqualifies MDSL's actions as "new" than would a judicial decision based on an existing statute or on existing precedent. Indeed, all regulations are based on existing statutes. Austin's reading would thus render the "regulation" in paragraph 9.06 a nullity. The key element in "new" is "unknowable" or "uncertain" and beyond the parties' control. These elements are present here.

Consistent with this opinion, we therefore reverse and remand this case to the district court for a determination of costs properly allocable to the City of Austin. We expressly do not here conclude what those costs, if any, are to be.

REVERSED AND REMANDED.

RANDALL, Circuit Judge, dissenting:

The majority holds that the phrase "new legislation, regulation, judicial action, . . . or labor agreement . . . enacted, promulgated, or taken or made effective after March 31, 1974" in this coal procurement contract is unambiguous and means "administrative action[] . . . take[n] . . . subsequent to March 31, 1974," even when that "administrative action" was taken pursuant to a statute and comprehensive regulations that had been in place since June 1, 1973. Majority op., text following note 31, supra. See Montana Strip Mining and Reclamation Act, ch. 325, § 9, 1973 Mont.Laws 592, 601-02 (current version at Mont.Code Ann. § 82-4-227 (1979)); Mont.Admin.Reg. §§ 26-2.10(01)-S10270 to -350 (1973) (superseded). In so doing, the majority reverses the district court's finding that

the "mere enforcement" or "new application" of the regulations to the mining area "does not constitute 'new legislation, regulation or judicial action.'" The majority's holding also effectively imposes upon the utility customers of the City of Austin and the Lower Colorado River Authority a judgment (payable over the life of the contract) that, in the parties' preliminary estimation, should amount to something in the neighborhood of $50 million.

I join the distinguished group of judges who have held the provision in question to be unambiguous, but I agree with the district court that it cannot fairly be read as the majority reads it. I therefore dissent.

I. THE FOUR CORNERS OF THE INSTRUMENT.

Like the majority, I begin with the text of the contract and with the Montana

rules of contract construction, but I part company with the majority's analysis almost from the outset. I believe that the majority has misread the provision in question, article 9.06, has created an inconsistency between the contract's fifth and ninth articles, has made an unnecessary gap in the language of article 9, and has, for all practical purposes, treated this contract as though it were a "cost-plus" contract, which it plainly is not. I address each of these issues in turn.

A. Contract Construction and the Text of Article 9.06.

Article 9.06 reads in its pertinent entirety as follows:

> The price of coal shall be increased from the base price in the same amount that the cost per ton of mining coal at the Mine is increased by any direct cost or required investment in order to comply with any new legislation, regulation, judicial action (other than the codification of the common law), or labor agreement . . . enacted, promulgated, or taken or made effective after March 31, 1974.

Article. 9.06. Each of the four nouns (legislation, regulation, judicial action, and labor agreement) is presented in a careful and deliberate order to match up precisely with the four, equally carefully ordered verbs (enacted, promulgated, taken, and made effective). This one-to-one matching produces a coherent statement about legislation enacted, regulation[s] promulgated, judicial action taken, and labor agreement[s] made effective. Any other match-up or jumble, e.g., judicial action enacted, produces nonsense. The operative provision, for our purposes, is therefore regulation promulgated, and no new regulation has been promulgated in this case.

The majority insists that this one-to-one matching approach is too artificial and that the contracting parties meant to cover all kinds of government action, but

in its eagerness to demonstrate the invalidity of the one-to-one approach, the majority has overlooked the necessity for tying its own interpretation of the contract to the actual text. Whatever the intrinsic merit of my own reading, I submit that the majority must tie the word "regulation" to one of the four verbs, and that the majority has not done so for the simple (and all too obvious) reason that it cannot.

The contract uses the word in the sense listed second in most dictionaries, "[a] rule prescribed for the management of some matter." See, e.g., 8 Oxford English Dictionary 380 (1933). So, too, does the majority opinion. Majority op., paragraph following text accompanying note 29, supra. But then at the crucial juncture the majority begins to use the word in its first sense, "the act of regulating."

See, e.g., Majority op., text accompanying note 32, supra ("'new regulation' would [not] require formal regulatory action").[1] That meaning of the word does not fit back into the contract, nor does the majority even attempt to claim that it does. Well established principles of contract construction in Montana prohibit exactly the kind of approach the majority has taken: "[A] court, in interpreting a written instrument, will not isolate certain phrases of that instrument in order to garner the intent of the parties." Steen v. Rustad, 132 Mont. 96, 102, 313 P.2d 1014, 1018 (1957). See also Downs v. Smyk, 604 P.2d 307, 310 (Mont. 1979). The word "regulation" cannot be

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1 To state the matter at its simplest, the sentence "Mining regulation in Montana is a complicated affair; the applicable regulations cover scores of pages" uses the word in the two different senses.

read as though it existed in the abstract, rather than in the grammatical context of a particular sentence.[2]

In short, the drafters of this contract knew what they were doing when they

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2 The majority has attempted to gloss over its failure to tie its interpretation to the text of the contract by invoking the well-worn principle that "words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning unless used by the parties in a technical sense." Mont.Code Ann. § 28-3-501 (1981). This conclusion explains nothing and, as far as it does go, is demonstrably wrong. Even if we managed somehow to read the word "regulation" without also looking at the sentence in which it appears, the word would still not mean what the majority says it means. When used in a thirty-four page, $350 million-plus contract--a document drafted by attorneys presumably expert in natural resources law--the word "regulation" has its normal specialized or legal meaning, that is, something promulgated in accordance with the Montana or United States administrative procedure acts and published either in the code of Federal Regulations or in the Administrative Rules of Montana.

wrote article 9.06. The operative phrase is "new regulation promulgated," and applying an old regulation is simply not the same thing as promulgating a new one. The majority reaches a contrary conclusion only by ignoring the principal of Steen v. Rustad and by refusing to read the word "regulation" with any of the four verbs to which it might arguably be attached.

B. The Relationship Between Articles 5 and 9.

The second unfortunate consequence of the majority's interpretation is that it creates a direct conflict between articles 5 and 9.06. Article 5 provides, in pertinent part:

> Seller agrees to acquire and install at its East Decker mine the most modern machinery, equipment and other facilities (as determined by Seller) required to produce, prepare and deliver the quality and quantity of coal provided for in this agreement. Seller further agrees to operate and maintain said machinery, equipment and facilities in accordance with good

> mining practices so as to efficiently and economically produce, prepare and deliver said coal. Seller further agrees that the machinery, equipment and facilities provided by it shall be acquired with its own capital.

(emphasis added). The practical effect of this provision is that the start-up costs associated with opening the mine on the basis of the statutes and regulations in effect on March 31, 1974, were to be borne by Decker. There is no real disagreement here. The majority argues, rather, that article 9.06 modifies article 5 even in the absence of a change in those statutes and regulations. I do not believe that the contract can be fairly read that way.

The gist of article 5 is that Decker was supposed to pay for opening the mine "with its own capital," and not with money provided by the City of Austin. In return, the City agreed to pay a flat base price of $7 per ton. See article 8. Articles 9.01, 9.02, 9.03, 9.04(1),

9.08(a), 9.08(b), and 9.08(c) then provide exceptions based, respectively upon multipliers of 1.06, 1.35, .23, .635, 1.7875, 1.7875, and .15--all of which (not coincidentally) add up to 7.0. The drafters clearly designed article 9.06 as the "second half" of article 5. That is, Decker was willing to assume--in return for the fixed base price (subject to price adjustments) of $7 per ton--all of the basic mining expenses associated with setting up a working mine that complied with all applicable statutes and regulations in effect as of March 31, 1974. The contradiction created by the majority's reading, in other words, arises out of the impossibility of giving full effect to article 5, which required Decker to set up the mine with its own capital for a fixed base price of $7 per ton, if article 9.06 is read to increase the base price <u>even</u>

when the applicable statutes and regulations have not been changed.

The majority quickly dismisses this argument on the apparent ground first, that "article 5 constitutes essentially boilerplate" and is, in any event, modified by article 9.06. See Majority op., paragraphs preceding and accompanying note 27, supra. This response is inadequate. Whether article 5 is boilerplate or not is irrelevant because whatever is in the contract we are required to enforce. More fundamentally, as I have already argued, article 9.06 most definitely does not allow Decker to pass on expenses associated with last-minute changes in its mining plan unless those expenses are caused by changes in or additions to the applicable statutes and regulations.

What appears to be the majority's primary argument for ignoring article 5 is even more disturbing:

> [T]he most obvious difficulty [with the dissent's argument] is that, if the parties did not intend interim government-mandated cost increases to be added to the price of coal, March 31, 1974, would not have been designated as the base date in paragraph 9.06; rather[,] the start-up date would have been used.

Majority op., paragraph accompanying note 26, supra. The majority's section-by-section chart of article 9 shows that the March 31, 1974 date was chosen for many reasons, e.g., as the base date for calculating cost increases based on the indices published by the Bureau of Labor Statistics. Nothing in the choice of March 31, 1974 is inconsistent with Decker's assumption in article 5 of the duty to set up a working mine according to whatever plan it deemed most appropriate. The quoted portion of the majority's opinion is no more

than a restatement of a desired conclusion, and not a persuasive argument.

The majority's interpretation of article 5 also has another troubling aspect. Contrary to what the majority suggests, what is involved here is not "damages," which the common law would require Decker to mitigate; rather, what is involved is a mandatory direct cost pass-through. Decker does not have any duty whatsoever to minimize its start-up costs. On the contrary, Decker has the express contractual right to open the mine with whatever machinery, equipment and other facilities it likes: "Seller agrees to acquire and install . . . machinery, equipment and other facilities (as determined by Seller) required to produce" coal. Article 5 (emphasis added). The contract has no mechanism for the City of Austin to share in the decisions about

how, in view of the conditions attached to the mining permit, the coal was to be mined; yet, the majority's approach requires, in common sense and fairness, that there be such a mechanism if the City is to be saddled with the costs. It seems to me not only that the contract has no mechanism, but also that its article 5 expressly forbids us from creating one.

The best that can be said for the majority's reading of article 5 is that Decker may not have realized that its original mining plan would not be accepted and that there was a consequent need to provide for that eventuality in the contract. The majority has resolved this problem in Decker's favor through the simple expedient of misreading article 9.06 and reading article 5 out of the contract entirely. By way of reply I can only repeat that "[i]t is reversible error

for [a Montana court] to insert into a contract language not put there by the parties," Herrin v. Herrin, 595 P.2d 1153 at 1155 (Mont. 1979), and that the majority's holding that article 9.06 can be (mis)read without article 5 does not make that reading right.

C. The Gap Created by the Majority's Reading of Article 9.06.

The third major problem with the majority's reading of the contract is that it creates an inexplicable gap in the otherwise fairly tight latticework of the contract. Article 9.06 provides that if "the cost per ton of mining coal at the Mine is increased by any direct cost or required investment," that increased cost may be passed on to the City of Austin (emphasis added). The problem, as the majority appears to concede, lies in calculating "the cost per ton of mining coal

at the Mine" when the contract itself provides no schedule defining that cost. See Majority op., paragraph accompanying note 28, supra. Under my interpretation of the contract, the problem was very unlikely to arise, but under the majority's interpretation, the problem was almost unavoidable. I find it hard to believe that the drafters of a contract as important and sophisticated as this one would not have expressly provided for a contingency that, given the majority's reading, was almost certain to arise.

As a general matter, it is difficult (though not impossible) to conceive of an "increase" in the "cost" of something unless that particular something is described, i.e., unless there is provided some kind of base figure or schedule from which the increase can be calculated. Under both my interpretation and that of

the majority, if mining costs were increased "by any direct cost or required investment" after 1978 (when the mine entered production), the amount of the increase could be accurately calculated by consulting Decker's books. See article 17 (requirement that Decker keep books in accordance with generally accepted accounting principles). A cost increase imposed between 1974 (when the contract was signed) and 1978 (the start-up year) would present a more difficult problem: the contract provides no schedule of estimated costs, and actual cost figures would not yet have been developed. No one would argue that Decker should be forced to bear the increased expenses associated with a Montana statute or regulation enacted or promulgated between 1974 and 1978, and yet the contract clearly provides no precise mechanism for calculating how to pass on

those increased expenses to the City of Austin. My argument would therefore appear to prove too much: if the contract provides a rule of decision that we could use as a basis for passing on the expenses associated with a pre-1978 but post-1974 statute or regulation, then it provides such a rule of decision for the present case as well.

I submit that this objection to my reading of the contract is not well taken. A statute or regulation enacted or promulgated between 1974 and 1978 would have been unexpected. Montana had just enacted a new mining statute, with a comprehensive set of interpretative regulations, in 1973 and--in the apparent and ultimately vindicated judgment of the parties--was not likely to make any material changes in that administrative scheme before 1978. The contract admittedly does not deal very

well (if at all) with the possibility of a pre-1978 statutory or regulatory amendment. But the unexpected is not this case. Decker knew from the very beginning that it would have to apply for a mining permit shortly after the contract was signed. The possibility of an adverse or partially adverse regulatory decision was real and immediate. If Decker had wanted to shift the burden of this known and expected risk to the City of Austin, it should have provided an appropriate contractual provision with an accompanying schedule of projected mining costs. Cf. article 9.02 (clause includes pre-opening labor cost increases, and provides sixteen-page schedule as "Exhibit B"). It did not, and, under Montana contract law, this court should not provide such a provision. Herrin, supra, 595 P.2d at 1155 ("It is reversible error for the District Court to

insert into a contract language not put there by the parties.").

The majority's response to this no-base-schedule problem amounts to no more than a simple assertion that the problem is insignificant--with the implication that the courts can always step in and make the requisite calculations for the contracting parties. See Majority op., paragraph accompanying note 28, supra. Any lawyer who has ever participated in major contract drafting will immediately appreciate that this is not the way things are done: the last things contract drafters want is uncertainty that may require expensive and time-consuming judicial intervention. And under the majority's interpretation, such intervention was almost certain to be necessary.

The majority further asserts--in two passages I find nothing short of astonishing--that the drafters could not, in any

event, have provided the requisite schedule of mining costs because of the inherent uncertainties in the entire project. See Majority op., note 28, supra ("An accurate 'schedule' for such an unknowable, future occurrence contradicts the very uncertainty with which the parties were concerned."); Majority op., third-to-last text paragraph, supra (uncertainties "could not have been factored by the parties into the contract"). This is simply not so. The majority plainly does not understand how such a schedule is drafted. The base schedule in this case would have been based upon the working papers that Decker undoubtedly prepared when it made the calculations necessary for the submission of its original $7 per ton bid. If those projections then turned out to be overly optimistic--for example, if a change in the mining plan required the use of more

trucks and shovels than had been anticipated--the later calculation of the increased costs would have been a matter of simple arithmetic.

The majority's interpretation also creates an internal inconsistency among the ten price adjustment sections in article 9. As I interpret article 9, all ten sections would almost surely have base figures; uncertainty would arise only in the unlikely event of a pre-1978 change in the applicable statutes and regulations. As the majority interprets the article, nine sections have base figures, but, in the very likely event that Decker's mining plan would have to be significantly altered, the relevant part of article 9.06 does not.[3] I think that it is improbable

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3 Column three of the majority's section-by-section chart of article 9 makes five mistakes: (1) The base for article 9.04(2) is 0 because the City

that the drafters would have provided precise numbers in nine instances, but not in one. Articles 9.02 and 9.08(a) have an attached schedule (Exhibit B, which lists labor costs) and, had the drafters wanted

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3 pays all of that cost; (2) the bases for article 9.05 are the various published tax schedules in effect March 31, 1974; (3) see item (1), supra; (4) the "quality" portion of the contract is perhaps more specific than any other part of the contract, see articles 4 & 9.09 ("The adjustment in price shall be the amount derived by multiplying the percentage resulting from the ratio of the actual BTU value per pound of coal over 9,200 BTU per pound, times the delivered cost of the coal purchased hereunder at Buyer's consuming power plants, minus the delivered cost of coal at Buyer's consuming power plants before the BTU adjustment."); and (5) article 9.10 is surplusage and simply says that Decker may not charge a higher price than that allowed by law: the concept of a "base" in that context would not even make sense. All of this leaves article 9.06 as the only part of article 9 that, under the majority's reading, has no base.

The majority's indication in column 3 of the chart that the contrary is true is misleading in the extreme.

to include the pre-1978 "cost increases" associated with the risk that the Montana Department of State Lands would require expensive changes in Decker's mining plan, they surely would not have failed to provide an appropriate schedule so that the amount of the increase could be calculated without recourse to litigation. The drafters knew how to write a true "cost-plus" provision for the pre-opening period. See articles 9.02, 9.08(a). They chose not to do so for article 9.06, and I think that this court should not do it for them.

D. This Is Not a "Cost-plus" Contract.

Although Decker conceded at oral argument that it is "not arguing that this is a cost-plus contract in the sense that that's how it's written," the majority has effectively adopted precisely that approach:

> In short, adjustment is provided for all other interim cost increases;

> interim increases required by governmental action are not treated any differently under the terms of the contract itself. If we are to give effect to every part of the contract, we must conclude that qualified, interim government-mandated cost increases were to be treated like all other cost increases and added to the price of the coal.

Majority op., paragraph accompanying note 29, supra (footnote omitted); see also Majority op., paragraph accompanying note 26, supra (statement to the same effect). From the near all-inclusiveness of the various specific price adjustments in article 9, in other words, the majority argues that we can infer that the parties meant to pass along to the City of Austin the presently disputed expenses as well.

This argument falls immediately because it directly contradicts Montana contract law. The relevant statute provides:

> All things that in law or usage are considered as incidental to a contract or as necessary to carry it into effect are implied therefrom unless some of them are expressly mentioned therein,

> in which case all other things of the same class are considered to be excluded.

Mont.Code Ann. § 28-3-702 (1981). The inclusion of the many price adjustments in article 9 does not imply the existence of other adjustments that might have been included in a "cost-plus" contract. On the contrary, the inclusion of the various adjustments means, under section 38-3-702, that we may not infer the existence of any other, extra-contractual adjustments.

I recognize, of course, that the Montana statute does little more than codify the maxim inclusio unius, exclusio alterius, and that mechanical reliance on a Latin maxim, even if statutorily mandated, generally should not replace sound substantive analysis. The point under section 28-3-702 needs to be made, however, because the majority's de facto "cost-plus" approach seems to have some

surface appeal--and no basis whatsoever in the text of the contract or in the Montana rules of contract construction.

II. THE EXTRINSIC EVIDENCE.

With all due respect for the parties and for the distinguished group of judges who have also read this contract, I think that it is appropriate to assume, for the sake of argument, that the contract is nevertheless unclear and that we therefore have occasion to examine evidence dehors its express language.

The parties, perhaps because each believes (no doubt for different reasons) that the contract is unambiguous, have submitted virtually no extrinsic evidence. We have been given no memoranda of telephone conversations, no accounts of contract bargaining sessions, no preliminary contract drafts--indeed, we have been given nothing except a thirty-one page

report from the Bechtel Power Corporation. The following analysis is thus perforce confined to the report.

According to the report, four companies competed for the right to supply coal for the City of Austin's Fayette Power Project. Among the reasons for recommending Decker's proposal over the others, the following was listed first: "Decker's is the only proposal which provides assurance of long-term price stability. The other three proposals contain explicit or implied clauses for renegotiation of the base price on an accept-the-increase-or-terminate-the-contract basis." Decker's bid was accepted, in other words, because "[t]he Decker coal price is firm and there is no price renegotiation clause" (emphasis added). This statement does, I believe, speak for itself. The fixed $7 per ton price induced the City of Austin

to enter into this contract in the first place.

Having gotten the job on the basis of its "firm" $7 per ton bid, Decker has now been put in the same position as it would have been in had it submitted the same kind of flexible-base-price proposal as its three competitors. Decker now wants, according to its statement at oral argument, a base price of about $8 per ton (subject, of course, to the various adjustments of article 9). In short, Decker wants--and the majority has given it--the bid advantages of a low price without the consequent disadvantages of lower gross receipts once the job is won. This, in my view, is absolutely unacceptable.

Indeed, the majority has now put Decker in a <u>better</u> position than its three competitors would have been in. All they had asked for, according to the Betchel report,

was an accept-the-increase-or-terminate-the-contract provision. If I read the majority's opinion correctly, it has given Decker the accept-the-increase part of the formula without giving the City of Austin the correlative option of terminating the contract. This, too, in my view, is absolutely unacceptable.

The majority has not considered any of this extrinsic evidence for the ostensible reason that, if a contract is clear, Montana law prohibits the interpreting court from looking at anything else. I suggest that the majority's real (though unstated) reasons may have more to do with the impossibility of dealing with the Bechtel Power report without conveying the distinct impression that this case has been wrongly decided.

III. CONCLUSION.

Article 5 of this coal procurement contract expressly provides that Decker

shall bear the expenses in issue. That article gives Decker the right to set up the mine in whatever sound manner it likes and the duty of doing so with its own capital. Article 9 then provides for a number of price adjustments, but none of those adjustments affects Decker's article 5 duty in the present case because the relevant triggering event--a change in the applicable statutes or regulations--has not occurred.

The majority reaches a contrary conclusion by making two interpretative mistakes. First, the majority virtually ignores article 5. Second, the majority misreads article 9.06 by posing the relevant interpretative question in terms of one meaning of the word "regulation" ("a rule prescribed for the management of some matter") and the answer in terms of an entirely different meaning ("the act of

regulating"): the practical consequence of the majority's sleight-of-hand is that it cannot tie its interpretation of the word ("the act of regulating") to any of the four verbs in the contract to which it might arguably be attached. In order to have read the word in the contract--as the Montana rules of construction require us to do--the majority would have had to have adopted a meaning of the word that it cannot adopt without conceding that it has wrongly decided this case.

I submit that the majority's interpretation does not make sense on any level. If Decker had wanted to pass on to the City of Austin the risks associated with applying for a mining permit from the Montana Department of State Lands, it should have expressly done so in the contract. Contracts of this caliber should not be "saved" by the Fifth Circuit, particularly when doing so creates both an

obvious gap (now do we calculate the "cost" to be passed through here?) and an obvious inconsistency (between article 5 and 9). The City of Austin entered into this contract in the first place principally because "[t]he Decker coal price is firm and there is no price renegotiation clause." Now, according to the majority, that price must be renegotiated without offering the City the correlative option of terminating the contract. Since the contract (for obvious reasons) has no mechanism for this renegotiation, what should have been a simple matter of arithmetic and contract interpretation has become a complicated proceeding for "damages."

I recognize that this is a diversity case in which Montana law governs. Nevertheless, I have prepared a dissent from the majority's opinion not simply because

I think that the legal conclusions reached by that opinion are incorrect. I am greatly troubled by the fact that in order to remedy a mistake made by a Montana coal company in assessing the possible impact of the Montana statutory and regulatory scheme on its mining plan, the majority has, in effect, saddled the already over-burdened utility customers served by the City of Austin and the Lower Colorado River Authority with a $50 million judgment representing a fourteen percent increase over what the parties agreed to as the cost of the coal.

I respectfully dissent.

APPENDIX B

Judgement of United States District for the Western District of Texas, Austin Division, Signed and Ordered November 24, 1981 in Cause No. A-79-CA-287

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF AUSTIN, TEXAS and LOWER COLORADO RIVER AUTHORITY	§	
VS.	§	CIVIL ACTION No. A-79-CA-287
DECKER COAL COMPANY, a Joint Venture, WYTANA, INC., and WESTERN MINERALS, INC.	§	

JUDGMENT

On the 16th day of September, 1981, the liability portion of this cause came on for trial before the Court based on the Stipulations filed by the parties. On this date came on to be considered the Additional Stipulations filed herein by the parties, wherein the parties stipulate to the amount of damages involved if the Court finds for the Plaintiffs on the

liability issues, and waive hearing and trial on the issue of damages in that event. The Court, having considered such stipulations, the pleadings and the argument of counsel, finds that judgment should be entered for Plaintiffs.

It is therefore ORDERED, ADJUDGED, DECREED and DECLARED that:

1. Plaintiffs City of Austin and Lower Colorado River Authority are not obligated to defendants Decker Coal Company, a joint venture, Wytana, Inc., and Western Minerals, Inc., for any costs billed or claimed by Defendants as a result of the action of the Department of State Lands of the State of Montana in refusing to approve Defendants' application for a mining permit which involved the mining of and spoilage into Deer Creek and its flood plain.

2. Plaintiffs City of Austin and Lower Colorado River Authority have and recover from Defendants Decker Coal Company, a joint venture, Wytana, Inc., and Western Minerals, Inc., jointly and severally, the amount of Ten Million One Hundred Seven Thousand Seven Hundred Twelve and 27/100 Dollars ($10,107,712.27),

which amount includes all pre-judgment interest), plus post-judgment interest thereon as provided by law and in the Coal Purchase Contract of October 24, 1974, between the parties.

3. Defendants take nothing from Plaintiffs, and that all relief requested in Defendants' Counter-claim be denied.

4. Plaintiffs recover their costs of action from Defendants.

SIGNED and ORDERED this 24th day of November, 1981

LUCIUS D. BUNTON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM ONLY:

OFFICE OF THE CITY ATTORNEY
P. O. Box 1088
Austin, Texas 78767

By_____
Terrence Lang Irion
ATTORNEYS FOR THE CITY OF
AUSTIN, TEXAS

SMALL, CRAIG & WERKENTHIN
2600 InterFirst Tower
Austin, Texas 78701
512-472-8355

By_____
Jim Alsup - 01111100
ATTORNEYS FOR LOWER COLORADO
RIVER AUTHORITY

Dennis P. Christianson
Peter Kiewit Sons', Inc.
1000 Kiewit Plaza
Omaha, Nebraska 68131

HOLLAND & HART
P. O. Box 8749
Denver, Colorado 80201

BROWN, MARONEY, ROSE,
BAKER & BARBER
1300 American Bank Tower
Austin, Texas 78701

By_____
Scott Kidd
ATTORNEYS FOR DEFENDANTS

APPENDIX C

Findings of Fact and Conclusions of Law entered by the United States District Court for the Western District of Texas, Austin Division, in Cause No. A-79-CA-287, signed and entered on November 30, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF AUSTIN, TEXAS and LOWER COLORADO RIVER AUTHORITY	§	
V.	§	CIVIL ACTION No. A-79-CA-287
DECKER COAL COMPANY, a Joint Venture, WYTANA, INC., and WESTERN MINERALS, INC.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. The Court adopts the facts set forth in the Stipulations and Additional Stipulations filed herein by the parties.

CONCLUSIONS OF LAW

1. The Coal Purchase Contract of October 24, 1974 is unambiguous on its face.

2. The changes in Defendants' mining plan and alleged increases in costs were not required in order to comply with any new legislation, regulation, judicial action or labor agreement enacted, promulgated or taken or made effective after March 31, 1974, within the terms of § 9.06 of the Coal Purchase Contract between Lower Colorado River Authority - City of Austin and Decker Coal Company; the terms of the Contract requiring Plaintiffs to pay for additional costs caused by "new legislation, regulation or judicial action" does not apply to mere enforcement of regulations already existing.

3. The regulation concerning mining in ecologically fragile areas was already in existence at the time the contract was entered, and the mere enforcement of it (or new application of it to the Deer Creek floodplain) does not constitute "new

legislation, regulation or judicial action."

4. The Plaintiffs are entitled to a declaratory judgment that they are not obligated to Defendants for any increased costs resulting from the action of the Montana Department of State Lands in refusing to approve Defendants' application for a mining permit which involved mining of the spoilage into Deer Creek and its floodplain.

5. Plaintiffs are entitled to recover from Defendants the sum of TEN MILLION ONE HUNDRED SEVEN THOUSAND SEVEN HUNDRED TWELVE & 27/100 DOLLARS ($10,107,712.27), plus postjudgment interest from November 25, 1981.

6. Defendants are not entitled to any relief requested in their Counterclaim.

SIGNED and ENTERED this 30th day of November, 1981.

LUCIUS D. BUNTON
United States District Judge

APPENDIX D

Judgement of United States Court of Appeals, Fifth Circuit, in Cause No. 81-1618, dated March 28, 1983.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-1618

D. C. Docket No. A-79-CA-287

CITY OF AUSTIN, TEXAS and
LOWER COLORADO RIVER AUTHORITY
Plaintiffs-Appellees,

V.

DECKER COAL COMPANY, a Joint
Venture, WYTANA, INC., and
WESTERN MINERALS, INC.,
Defendants-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, RANDALL and JOLLY,
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the

said District Court for further proceedings consistent with the opinion of this Court:

IT IS FURTHER ORDERED that Plaintiffs-Appellees pay to Defendants-Appellants the costs on appeal, to be taxed by the Clerk of this Court.

March 28, 1983

RANDALL, Circuit Judge, dissenting.

ISSUED AS MANDATE: June 19, 1983

APPENDIX E

Order on Petition for Rehearing and Suggestion for Rehearing En Banc, entered by the United States Court of Appeals, Fifth Circuit, in Cause No. 81-1618, dated March 28, 1983.

CITY OF AUSTIN, TEXAS and
LOWER COLORADO RIVER AUTHORITY,
Plaintiffs-Appellees,

V.

DECKER COAL COMPANY, a joint Venture,
Wytana, Inc., and Western Minerals, Inc.,
Defendants-Appellant.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

May 31, 1983.

Appeal from the United States District Court for the Western District of Texas; Lucius Desha Bunton, III, Judge.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(March 28, 1983, slip op. 3350, 701 F.2d 420)

Before RUBIN, RANDALL and JOLLY
Circuit Judges.

PER CURIAM:

No member of this panel nor judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, the Suggestion for Rehearing En Banc is DENIED.

The panel has carefully considered the Petition for Rehearing. No new light has been shed on this case by the substantive arguments. As to the point made that the panel opinion cites to the interrogatories in its factual recitation and in support of its decision, we recognize that the interrogatories were not entered into the record. The case was tried on the stipulation of facts. The differences between the stipulation and the interrogatories are not significant in the context with which we are here concerned. The stipulated facts amply support the conclusion that the determination made by the Montana Department of State Lands was based on a lengthy, extensive investigation and was not a mere ministerial action by MDSL.

The petition for Rehearing is, therefore, also DENIED.

APPENDIX F

Chapter 325, Session Laws of Montana, 1983

CHAPTER NO. 325

An Act Creating "The Montana Strip Mining and Reclamation Act" and Providing for the Control of Prospecting For and the Strip Mining of Coal, Clay, Phospate Rock, and Uranium; Providing for Permits, Reclamation Plan Requirements, Methods of Operation, and Penalties; Providing for the Termination of Reclamation Contracts Entered into Under Chapter 245; Laws of Montana, 1967; Repealing Sections 50-1018 through 1033, R.C.M. 1947; and Providing an Effective Date.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. This act shall be known and may be cited as "The Montana Strip Mining and Reclamation Act."

Section 2. It being the declared policy of this state and its people

-to maintain and improve the state's clean and healthful environment for present and future generations,

-to protect its environmental life-support system from degradation,

-to prevent unreasonable degradation of its natural resources,

-to restore, enhance, and preserve its scenic, historic, archeologic, scientific, cultural, and recreational sites,

-to demand effective reclamation of all lands disturbed by the taking of natural resources, and

-to require the legislature to provide for proper administration and enforcement, create adequate remedies, and set effective requirements and standards (especially as to reclamation of disturbed lands) in order to achieve the aforementioned objectives, the legislature hereby finds and declares:

(1) That, in order to achieve the aforementioned policy objectives, promote the health and welfare of the people, control erosion and pollution, protect domestic stock and wildlife, preserve agricultural and recreational productivity, save cultural, historic and aesthetic values and assure a long-range dependable tax base, it is reasonably necessary to require, after the effective date of this act, that all strip mining operations be limited to those for which annual permits are granted, that no permit be issued until the operator presents a comprehensive plan for surface reclamation and restoration, together with an adequate performance bond, and the plan is approved, that certain other things must be done, that certain remedies are available, and that certain lands because of their unique or unusual characteristics may not be strip mined under any circumstances, all as more particularly appears in the remaining provisions of this act.

(2) That this act be deemed to be an exercise of the authority granted in the Montana constitution, as adopted June 6, 1972, and in particular, a response to the

mandate expressed in article IX thereof, and also be deemed to be an exercise of the general police power to provide for the health and welfare of the people.

Section 3. Unless the context requires otherwise in this act:

(1) "mineral" means coal, clay, phosphate rock, and uranium;

(2) "overburden" means all of the earth and other materials which lie above a natural mineral deposit and also means such earth and other material after removal from their natural state in the process of strip mining;

(3) "strip mining" means any part of the process followed in the production of mineral by the open cut method including mining by the auger method or any similar method which penetrates a mineral deposit and removes mineral directly through a series of openings made by a machine which enters the deposit from a surface excavation, or any other mining method or process in which the strata or overburden is removed or displaced in order to recover the mineral;

(4) "prospecting" means the removal of overburden, core drilling, construction of roads or any other disturbance of the surface for the purpose of determining the location, quantity, or quality of a natural mineral deposit;

(5) "area of land affected" means the area of land from which overburden is to be or has been removed and upon which the overburden is to be or has been deposited

and includes all lands affected by the construction of new railroad loops and roads or the improvement or use of existing railroad loops and roads to gain access and to haul the mineral;

(6) "operation" means all of the premises, facilities, railroad loops, roads, and equipment used in the process of producing and removing mineral from a designated strip mine area, or prospecting for the purpose of determining the location, quality, or quantity of a natural mineral deposit;

(7) "operator" means a person engaged in strip mining who removes or intends to remove more than ten thousand (10,000) cubic yards of mineral or overburden;

(8) "person" means a person, partnership, corporation, association, or other legal entity, or any political subdivision, or agency of the state;

(9) "method of operation" means the method or manner by which the cut or open pit is made, the overburden is placed or handled, water is controlled and other acts are performed by the operator in the process of uncovering and removing the mineral that affect the reclamation of the area of land affected;

(10) "topsoil" means the unconsolidated mineral matter naturally present on the surface of the earth that has been subjected to and influenced by genetic and environmental factors of parent material, climate, macro- and microorganisms, and topography, all acting over a period of time, and that is necessary for the growth

and regeneration of vegetation on the surface of the earth;

(11) "department" means the department of state lands provided for in title 82A, chapter 11;

(12) "commissioner" means the commissioner of state lands provided for in section 82A-1104;

(13) "board" means the board of land commissioners provided for in article X, section 4 of the constitution of this state;

(14) "reclamation" means backfilling, grading, highwall reduction, topsoiling, planting, revegetation, and other work to restore an area of land affected by strip mining under a plan approved by the department;

(15) "degree" means from the horizontal, and in each case is subject to a tolerance of five per cent (5%) error;

(16) "contour strip mining" means that strip mining method commonly carried out in areas of rough and hilly topography in which the coal or mineral seam outcrops along the side of the slope and entrance is made to the seam by excavating a bench or table cut at and along the site of the seam outcropping with the excavated overburden commonly being cast down the slope below the mineral seam and the operating bench;

(17) "bench" means the ledge, shelf, table, or terraces formed in the contour method of strip mining;

(18) "fill bench" means that portion of a bench or table which is formed by depositing overburden beyond or down slope from the cut section as formed in the contour method of strip mining;

(19) "abandoned" means an operation where no mineral is being produced and where the department determines that the operation will not continue or resume.

Section 4. The board:

(1) shall issue after an opportunity for a hearing, orders requiring an operator to adopt the remedial measures necessary to comply with this act and rules adopted under this act;

(2) shall issue after an opportunity for a hearing, a final order directing the department to revoke a permit, when the requirements set forth by the notice of noncompliance, order of suspension, or an order of the board requiring remedial measures have not been complied with according to the terms herein;

(3) shall adopt after an opportunity for a hearing, general rules pertaining to strip mining to accomplish the purposes of this act;

(4) shall conduct hearings under provisions of this act or rules adopted by the board.

Section 5. The department:

(1) shall exercise general supervision, administration, and enforcement of

this act and all rules and orders adopted under this act;

(2) shall examine and pass upon all plans and specifications submitted by the operator for the method of operation, backfilling, grading, highway reduction, topsoiling and for the reclamation of the area of land affected by this operation;

(3) shall order the suspension of any permit for failure to comply with this act or any rule adopted under this act;

(4) shall order the halting of any operation that is started without first having secured a permit as required by this act;

(5) shall make investigations and inspections necessary to insure compliance with this act;

(6) may encourage and conduct investigations, research, experiments and demonstrations, and collect and disseminate information relating to strip mining and reclamation of lands and waters affected by strip mining;

(7) may adopt rules with respect to the filing of reports, the issuance of permits and other matters of procedure and administration.

Section 6. (1) An operator may not engage in strip mining without having first obtained from the department a permit designating the area of land affected by the operation. The permit shall authorize the operator to engage in strip mining upon the area of land described in

his application and designated in the permit for a period of one (1) year from the date of its issuance. Such permit shall be renewable from year to year thereafter upon application to the department at least thirty (30) but not more than sixty (60) days prior to the renewal date so long as the operator is in compliance with the requirements of this act, the rules hereunder, and the reclamation plan provided for in section 10 of this act, and agrees to comply with all applicable laws and rules in effect at the time of renewal. Such renewal shall further be subject to the denial provisions of sections 9 and 13 of this act.

(2) An operator desiring a permit shall file a application which shall contain a complete and detailed plan for the mining, reclamation, revegetation, and rehabilitation of the land and water to be affected by the operation. Such plan shall reflect thorough advance investigation and study by the operator and shall include all known or readily discoverable past and present uses of the land and water to be affected and the approximate periods of such use and shall state:

(a) the location and area of land to be affected by the operation, with a description of access to the area from the nearest public highways;

(b) the names and addresses of the owners of record of the surface of the area of land to be affected by the permit and the owners of record of all surface area within one-half (.5) mile of any part of the affected area;

(c) the names and addresses of the present owners of record of all subsurface minerals in the land to be affected;

(d) the source of the applicant's legal right to mine the mineral on the land affected by the permit;

(e) the permanent and temporary post office addresses of the applicant;

(f) whether the applicant or any person associated with the applicant holds or has held any other permits under this act, and an identification of those permits;

(g) whether the applicant is in compliance with subsection (2) of section 17 and whether every officer, partner, director, or any individual owning of record or beneficially (alone or with associates) if known, ten per cent (10%) or more of any class of stock of the applicant, is subject to any of the provisions of subsection (2) of section 17 and he shall so certify, and whether any of the foregoing parties or persons have ever had a strip mining license or permit issued by any other state or federal agency revoked, or have ever forfeited a strip mining bond or a security deposited in lieu of a bond and if so, a detailed explanation of the facts involved in each case must be attached;

(h) the names and addresses of any persons who are engaged in strip mining activities on behalf of the applicant;

(i) the annual rainfall and the direction and average velocity of the

prevailing winds in the area where the applicant has requested a permit;

(j) the results of any test borings or core samplings which the applicant or his agent has conducted on the land to be affected, including the nature and the depth of the various strata or overburden and topsoil, the quantities and location of subsurface water and its quality, the thickness of any mineral seam, an analysis of the chemical properties of such minerals, including the acidity, sulphur content, and trace mineral elements of any coal seam, as well as the british thermal unit (B.T.U.) content of such seam, and an analysis of the overburden, including topsoil. If test borings or core samplings are submitted, each permit application shall contain two (2) copies of two (2) sets of geologic cross-section accurately depicting the known geologic makeup beneath the surface of the affected land. Each set shall depict subsurface conditions at five hundred (500) foot intervals across the surface and shall run at a ninety (90) degree angle to the other set. Each cross-section shall depict the thickness and geological character of all known strata beginning with the top soil;

(k) the name and date of a daily newspaper of general circulation within the county in which the applicant has prominently published an announcement of his application for a strip mining permit, and a detailed description of the area of land to be affected should a permit be granted;

(l) such other or further information as the department may require.

(3) The application for a permit shall be accompanied by two (2) copies of all maps meeting the requirements of the subsections below. The map shall:

(a) identify the area to correspond with the application;

(b) show any adjacent deep mining and the boundaries of surface properties and names of owners of record of the affected area and within one thousand (1,000) feet of any part of the affected area;

(c) show the names and locations of all streams, creeks, or other bodies of water, roads, buildings, cemeteries, oil and gas wells, and utility lines on the area of land affected and within one thousand (1,000) feet of such area;

(d) show by appropriate markings the boundaries of the area of land affected, any cropline of the seam or deposit of mineral to be mined, and the total number of acres involved in the area of land affected;

(e) show the date on which the map was prepared and the north point;

(f) show the drainage plan on and away from the area of land affected. This plan shall indicate the directional flow of water, constructed drainways, natural waterways used for drainage, and the streams or tributaries receiving the discharge;

(g) show the proposed location of waste or refuse area;

(h) show the proposed location of temporary subsoil and topsoil storage area;

(i) show the location of test boring holes;

(j) show the surface location lines of any geologic cross-sections which have been submitted;

(k) show a listing of plant varieties encountered in the area to be affected and their relative dominance in the area, together with an enumeration of tree varieties and the approximate number of each variety occurring per acre on the area to be affected, and the locations generally of the various kinds and varieties of plants, including but not limited to grasses, shrubs, legumes, forbs and trees;

(l) be certified as follows: "I, the undersigned, hereby certify that this map is correct, and shows to the best of my knowledge and belief all the information required by the strip mining laws of this state." The certification shall be signed and notarized. The department may reject a map as incomplete if its accuracy is not so attested;

(m) contain such other or further information as the department may require.

(4) In addition to the information and maps required above, each application for a permit shall be accompanied by detailed plans or proposals showing the method of operation, the manner, time or distance, and estimated cost for backfilling, grading work, highwall reduction,

topsoiling, planting, revegetating, and a reclamation plan for the area affected by the operation, which proposals shall meet the requirements of this act and rules adopted under this act.

(5) An application fee of fifty dollars ($50) shall be paid before the permit required in this section shall be issued. The operator shall file with the department a bond payable to the state of Montana with surety satisfactory to the department in the penal sum to be determined by the board (on the recommendation of the commissioner) of not less than two hundred dollars ($200) nor more than twenty-five hundred dollars ($2,500) for each acre or fraction thereof of the land affected, with a minimum bond of two thousand dollars ($2,000), conditioned upon the faithful performance of the requirements set forth in this act and of the rules of the board. In determining the amount of the bond within the above limits, the board shall take into consideration the character and nature of the overburden, the future suitable use of the land involved and the cost of backfilling, grading, highwall reduction, topsoiling, and the reclamation to be required; but in no event shall the bond be less than the total estimated cost to the state of completing the work described in the reclamation plan.

Section 7. The department may increase or reduce the area of land affected by an operation under a permit on application by an operator, but an increase may not extend the period for which an original permit was issued. An operator may, at any time within one (1) year from the date

of issuance of the permit, apply to the department for an amendment of the permit so as to increase or reduce the acreage affected by it. The operator shall file an application and map in the same form and with the same content as required for an original application under this act and shall pay an application fee of fifty dollars ($50) and shall file with the department a supplemental bond in the amount to be determined under section 6 for each acre or fraction of an acre of the increase approved. If the department approves a reduction in the acreage covered by the original or supplemental permit, it shall release the bond for each acre reduced, but in no case shall the bond be reduced below two thousand dollars ($2,000), except as provided in subsection (5) of section 6.

Section 8. (1) On and after the effective date of this act prospecting by any person on land not included in a valid strip mining permit shall be unlawful without possessing a valid prospecting permit issued by the department as provided in this section. No prospecting permit shall be issued until the operator submits an application, the application is examined, amended if necessary, and approved by the department, and adequate reclamation performance bond is posted, all of which prerequisites must be done in conformity with the requirements of this act.

(2) An application for a prospecting permit shall be made in writing, notarized, and submitted to the department in duplicate forms prepared and furnished by it. The application shall include among

other things, a prospecting map and a prospecting reclamation plan of substantially the same character as required for a surface mining map and reclamation plan under this act. The department shall determine, by rules and regulations, the precise nature of such required prospecting map and reclamation plan. Any operator who intends to prospect by means of core drilling shall specify the location and number of holes to be drilled, methods to be used in sealing aquifers, and such other information as may be required by the department. The applicant must state what types of prospecting and excavating techniques will be employed on the affected land. The application shall also include any other or further information the department may require.

(3) The application shall be accompanied by a fee of one hundred dollars ($100). This fee shall be used as a credit toward the strip mining permit fee provided by this act if the area covered by the prospecting permit becomes covered by a valid surface mining permit obtained before or at the time the prospecting permit expires.

(4) Before the department gives final approval to the prospecting permit application, the applicant shall file with the department a reclamation and revegetation bond in a form and in an amount as determined in the same manner for strip mining reclamation and revegetation bonds until this act.

(5) In the event that the holder of a prospecting permit desires to strip mine

the area covered by the prospecting permit, and has fulfilled all the requirements for a strip mining permit, the department may permit the postponement of the reclamation of the acreage prospected if that acreage is incorporated into the complete reclamation plan submitted with the application for a strip mining permit. Any land actually affected by prospecting or excavating under a prospecting permit and not covered by the strip mining reclamation plan shall be promptly reclaimed.

(6) The prospecting permit shall be valid for one (1) year, and shall be subject to renewal, suspension, and revocation in the same manner as strip mining permits under this act.

(7) The holder of the prospecting permit shall file with the department the same progress reports, maps, and revegetation progress reports, as are required of strip mining operators under this act.

Section 9. (1) An application for a prospecting or strip mining permit shall not be approved by the department if there is found on the basis of the information set forth in the application, an on-site inspection, and an evaluation of the operation by the department that the requirements of the act or rules will not be observed or that the proposed method of operation, backfilling, grading, highwall reduction, topsoiling, revegetation, or reclamation of the affected area cannot be carried out consistent with the purpose of this act.

(2) The department shall not approve the application for prospecting or strip mining permit where the area of land described in the application includes land having special, exceptional, critical, or unique characteristics, or that mining or prospecting on that area would adversely affect the use, enjoyment, or fundamental character of neighboring land having special, exceptional, critical, or unique characteristics. For the purpose of this act, land is defined as having such characteristics if it possesses special, exceptional, critical or unique:

(a) biological productivity, the loss of which would jeopardize certain species of wildlife or domestic stock; or

(b) ecological fragility, in the sense that the land, once adversely affected, could not return to its former ecological role in the reasonable foreseeable future; or

(c) ecological importance, in the sense that the particular land has such a strong influence on the total ecosystem of which it is a part that even temporary effect felt by it could precipitate a system-wide reaction of unpredictable scope or dimensions; or

(d) scenic, historic, archeologic, topographic, geologic, ethnologic, scientific, cultural, or recreational significance. In applying this subsection, particular attention should be paid to the inadequate preservation previously accorded Plains Indian history and culture.

(3) If the department finds that the overburden on any part of the area of land described in the application for a prospecting or strip mining permit is such that experience in the state with the similar type of operation upon land with similar overburden shows that substantial deposition of sediment in streambeds, landslides, or water pollution cannot feasibly be prevented, the department shall delete that part of the land described in the application upon which the overburden exists.

(4) If the department finds that the operation will constitute a hazard to a dwelling house, public building, school, church, cemetery, commercial or institutional building, public road, stream, lake, or other public property, the department shall delete those areas from the prospecting or strip mining permit application before it can be approved.

Section 10. (1) As rapidly, completely, and effectively as the most modern technology and the most advanced state of the art will allow, each operator granted a permit under this act, shall reclaim and revegetate the land affected by his operation. Under the provisions of this act and rules adopted by the board, an operator shall prepare and carry out a method of operation, plan of grading, backfilling, highwall reduction, topsoiling and a reclamation plan for the area of land affected by his operation. In developing a method of operation, and plans of backfilling, grading, highwall reduction, topsoiling and reclamation, all measures shall be taken to eliminate damages to landowners and members of the public,

their real and personal property, public roads, streams and all other public property from soil erosion, landslides, water pollution, and hazards dangerous to life and property. The reclamation plan shall set forth in detail the manner in which the applicant intends to comply with this section and sections 11, 12 and 13 of this act. The plan shall be submitted to the department and the department shall notify the applicant by registered mail within one hundred twenty (120) days after receipt of the plan and complete application if it is or is not acceptable. The department may extend the one hundred twenty (120) days an additional one hundred twenty (120) days upon notification of the operator in writing. If the plan is not acceptable, the department shall set forth the reasons why the plan is not acceptable and it may propose modifications, delete areas, or reject the entire plan. A land owner, operator, or any person aggrieved by the decision of the department may, by written notice, request a hearing by the board. The board shall notify the person by registered mail within twenty (20) days after the hearing of its decision. Every reclamation plan shall be subject to annual review and modification.

(2) In addition to the method of operation, grading, backfilling, highwall reduction, topsoiling and reclamation requirements of this act and rules adopted under this act, the operator, consistent with the directives of subsection (1) of this section shall:

(a) bury under adequate fill all toxic materials, shale, mineral, or any

other material determined by the department to be acid producing, toxic, undesirable, or creating a hazard;

(b) seal off, as directed by rules, any breakthrough of water creating a hazard;

(c) impound, drain, or treat all runoff water so as to reduce soil erosion, damage to grazing and agricultural lands, and pollution of surface and subsurface waters;

(d) remove or bury all metal, lumber, and other refuse resulting from the operation;

(e) use explosives in connection with the operation only in accordance with department regulations designed to minimize noise, surface damage to adjacent lands and water pollution, ensure public safety, and for other purposes.

(3) An operator may not throw, dump, pile or permit the dumping, piling, or throwing or otherwise placing any overburden, stones, rocks, mineral, earth, soil, dirt, debris, trees, wood, logs or any other materials or substances of any kind or nature beyond or outside of the area of land which is under permit and for which a bond has been posted under section 6, or place the materials described in this section in such a way that normal erosion or slides brought about by natural physical causes will permit the materials to go beyond or outside the area of land which is under permit and for which a bond has been posted under sectin 6.

Section 11. (1) Area strip mining, a method of operation which does not produce a bench or fill bench, is required. All highwalls must be reduced and the steepest slope of the reduced highwall shall be no greater than twenty (20) degrees from the horizontal. Highwall reduction shall be commenced at or beyond the top of the highwall and sloped to the graded spoil bank. Reduction, backfilling, and grading shall eliminate all highwalls and spoil peaks. The area of land affected shall be restored to the approximate original contour of the land. When directed by the department, the operator shall construct in the final grading, such diversion ditches, depressions, or terraces as will accumulate or control the water runoff. Additional restoration work may be required by the department according to rules adopted by the board.

(2) In addition to the backfilling and grading requirements, the operator's method of operation on steep slopes may be regulated and controlled according to rules adopted by the board. These rules may require any measure whatsoever to accomplish the purpose of this act.

(3) All available topsoil shall be removed in a separate layer, guarded from erosion and pollution, kept in such a condition that it can sustain vegetation of at least the quality and variety it sustained prior to removal, and returned as the top layer after the operation has been backfilled and graded; provided that the operator shall accord substantially the same treatment to any subsurface deposit of material that is capable, as

determined by the department, of supporting surface vegetation virtually as well as the present topsoil.

(4) As determined by rules of the board, time limits shall be established requiring backfilling, grading, highwall reduction, topsoiling, planting, and revegetation to be kept current. All backfilling, grading, and topsoiling shall be completed before necessary equipment is moved from the operation.

(5) When the backfilling, grading, and topsoiling have been completed and approved by the department, the commissioner may release so much of the bond which was filed for that portion of the operation as the commissioner may determine, provided that no less than two hundred dollars ($200) per acre shall be retained by the department until such time as the planting and revegetation is done according to law and approved by the department, at which time the commissioner shall release the bond in the remaining amount.

(6) An operator may propose alternative plans other than backfilling, grading, highwall reduction, or topsoiling if the restoration will be consistent with the purpose of this act. These plans shall be submitted to the department, and, after consultation with the landowner, if the plans are approved by the board and complied with within the time limits as may be determined by the board as being reasonable for carrying out the plans, the backfilling, grading, highwall reduction, or topsoiling requirements of this act may be modified by the board. An operator who

proposes alternative plans that will affect an existing permit shall comply with the notice requirement of section 6(2)(k).

Section 12. After the operation has been backfilled, graded, topsoiled, and approved by the department, the operator shall prepare the soil and plant such legumes, grasses, shrubs, and trees upon the area of land affected as are necessary to provide a suitable permanent diverse vegetative cover capable of:

(a) feeding and withstanding grazing pressure from a quantity and mixture of wildlife and livestock at least comparable to that which the land could have sustained prior to the operation;

(b) regenerating under the natural conditions prevailing at the site, including occasional drought, heavy snowfalls, and strong winds; and

(c) preventing soil erosion to the extent achieved prior to the operation.

The seed or plant mixtures, quantities, method of planting, type and amount of lime or fertilizer, mulching, irrigation, fencing, and any other measures necessary to provide a suitable permanent diverse vegetative cover shall be defined by rules of the board.

Section 13. The operator shall commence the reclamation of the area of land affected by his operation as soon as possible after the beginning of strip mining of that area in accordance with plans previously approved by the department.

Those grading, backfilling, topsoiling, and water management practices that are approved in the plans shall be kept current with the operation as defined by rules of the board a permit or supplement to a permit may not be issued, if in the discretion of the department, these practices are not current.

Section 14. (1) At least sixty (60) days prior to the date of each permit expiration, the operator shall file a planting report with the department on a form to be prescribed and furnished by the department, giving the following information:

(a) identification of the operation;

(b) the type of planting or seeding, including mixtures and amounts;

(c) the date of planting or seeding;

(d) the area of land planted;

(e) any other relevant information the department requires.

(2) All planting reports shall be certified by the operator.

(3) Inspection and evaluation for permanent diverse vegetative cover shall be made as soon as it is possible to determine if a satisfactory stand has been established. If the department determines that a satisfactory permanent diverse vegetative cover has been established, it shall release the remaining bond held on the area reclaimed after public notice and an opportunity for a hearing; but in no

event shall such remaining bond be released prior to a period of five (5) years from the initial planting provided for in section 12 of this act.

Section 15. All legumes, grasses, shrubs, and trees which are planted or seeded on the area of land affected as required by this act or rules adopted under this act, become the property of the landowner, after complete release of the bond, unless the operator and the landowner agree otherwise.

Section 16. Within sixty (60) days after each date of expiration of a permit, the operator shall annually file with the department a report stating the exact number of acres of land affected by the operation, the extent of the reclamation already accomplished by him, and any other information required by the rules of the department and the board. The report shall be accompanied by a copy of the map filed with the original application which shall show any revisions made necessary by results of the operation.

Section 17. (1) If any of the requirements of this act or rules or orders of the department and the board have not been complied with within the time limits set by the department or the board or by this act, the department shall serve a notice of noncompliance on the operator, or where found necessary, the commissioner shall order the suspension of a permit. The notice or order shall be handed to the operator in person or served by registered mail addressed to the permanent address shown on the application for a permit. The notice of noncompliance or

order of suspension shall specify in what respects the operator has failed to comply with this act or the rules or orders of the department and the board. If the operator has not complied with the requirement set forth in the notice of noncompliance or order of suspension within time limits set therein, the permit may be revoked by order of the board and the performance bond forfeited to the department.

(2) Any additional permits held by an operator whose mining permit has been revoked shall be suspended and the operator is not eligible to receive another permit or to have the suspended permits reinstated until he has complied with all the requirements of this act in respect to former permits issued him. An operator who has forfeited a bond is not eligible to receive another permit unless the land for which the bond was forfeited has been reclaimed without cost to the state, or the operator has paid into the reclamation account a sum together with the value of the bond, the board finds adequate to reclaim the lands. The department may not issue any additional permits to an operator who has repeatedly been in noncompliance or violation of this act.

Section 18. Where one operator succeeds another at an uncompleted operation, either by sale, assignment, lease, or otherwise, the department may release the first operator from all liability under this act as to that particular operation if both operators have been issued a permit and have otherwise complied with the

requirements of this act, and the successor operator assumes as part of his obligation under this act, all liability for the reclamation of the area of land affected by the former operator.

Section 19. (1) All fees, forfeit funds, and other moneys available or paid to the department under the provisions of this act shall be placed in the state treasury and credited to a special agency account to be designated as the strip mining and reclamation fund. This fund shall be available to the department by appropriation and shall be expended for the administration and enforcement of this act and for the reclamation and revegetation of land and the rehabilitation of water affected by any mining operations. Any unencumbered and any unexpended balance of this fund remaining at the end of any fiscal year shall not lapse but shall be caried forward for the purposes of this act until expended or until appropriated by subsequent legislative action.

Section 20. (1) The board may receive any federal funds, state funds, or any other funds for the reclamation of land affected by strip mining. The board may have reclamation work done by its own employees or by employees of other governmental agencies, soil conservation districts, or through contracts with qualified persons.

(2) Any funds or any public works programs available to the board shall be used and expended to reclaim and rehabilitate lands that have been subjected to strip mining that have not been reclaimed

and rehabilitated in accordance with the standards of this act.

Section 21. The board may reclaim, in keeping with the provisions of this act, any affected lands with respect to which a bond has been forfeited and to use moneys appropriated from the strip mining and reclamation fund for such purposes.

Section 22. A resident of this state, with knowledge that a requirement of this act or rule adopted under this act, is not being enforced by a public officer or employee whose duty it is to enforce the requirement or rule may bring the failure to enforce to the attention of the public officer or employee by a written statement under oath that shall state the specific facts of the failure to enforce the requirement or rule. Knowingly making false statements or charges in the affidavit subjects the affiant to penalties prescribed under the law or perjury.

(2) If the public officer or employee neglects or refuses for an unreasonable time after receipt of the statement to enforce the requirement or rule, the resident may bring an action of mandamus in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or in the district court of the county in which the land is located. The court, if it finds that a requirement of this act or a rule adopted under this act, is not being enforced shall order the public officer or employee, whose duty it is to enforce the requirement or rule, to perform his duties. If he fails to do so, the public

officer or employee shall be held in contempt of court and is subject to the penalties provided by law.

(3) An owner of an interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground source other than a subterranean stream having a permanent, distinct, and known channel, may sue an operator to recover damages for contamination, diminution, or interruption of the water supply, proximately resulting from strip mining.

(4) A servient tract of land is not bound to receive surface water contaminated by strip mining on a dominant tract of land, and the owner of the servient tract may sue an operator to recover the damages proximately resulting from the natural drainage from the dominant tract of surface waters contaminated by strip mining on the dominant tract.

(5) This section does not create, modify, or affect any right, liability, or remedy other than as expressly provided in this section.

Section 23. (1) A person or operator who violates any of the provisions of this act or rules or orders adopted under this act shall pay a civil penalty of not less than one hundred dollars ($100) nor more than one thousand dollard ($1,000) for the violation, and an additional civil penalty of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each day during which a violation continues, and may be enjoined from

continuing such violations as hereinafter provided in this section. These penalties shall be recoverable in any action brought in the name of the state of Montana by the attorney general in the district court of the first judicial district of this state, in and for the county of Lewis and Clark, or in the district court having jurisdiction of the defendant.

(2) The attorney general shall, upon the request of the commissioner, sue for the recovery of the penalties provided in this section for, and bring an action for a restraining order, temporary or permanent injunction, against an operator or other person violating or threatening to violate an order adopted under this act.

(3) A person who willfully violates any of the provisions of this act, or any determination or order adopted under this act which has become final is guilty of a misdemeanor and shall be fined not less than five hundred dollars ($500) and not more than five thousand dollars ($5,000). Each day on which a violation occurs constitutes a separate offense.

Section 24. All hearings and appeal procedures shall be in accordance with sections 82-4209 through 82-4217.

Section 25. If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 26. Sections 50-1018 through 50-1033, R.C.M. 1947, are repealed.

Section 27. Every operator shall within ninety (90) days after the effective date of this act file with the department an application for a permit.

Section 28. Ninety (90) days after the effective date of this act, the state shall proceed to cancel, according to their terms, all existing contracts entered into pursuant to chapter 245, laws of Montana, 1967. If the contract does not provide according to its terms, for the cancellation, it shall be terminated and void within two hundred seventy (270) days after the effective date of this act.

Section 29. This act is effective on its passage and approval.

Approved: March 16, 1973.

APPENDIX G

Stipulations dated May 1, 1981 (without exhibits)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF AUSTIN, TEXAS and LOWER COLORADO RIVER AUTHORITY	§	
	§	CIVIL ACTION
V.	§	No. A-79-CA-287
	§	
DECKER COAL COMPANY, a Joint Venture, WYTANA, INC., and WESTERN MINERALS, INC.	§	

STIPULATIONS

Come now Plaintiffs City of Austin, Texas, and Lower Colorado River Authority and Defendants Decker Coal Company; Wytana, Inc.; and Western Minerals, Inc., by and through their respective attorneys, and hereby stipulate, for purposes of trial of the liability portion only of the above-styled and numbered cause (the liability and damages portions having been previously bifurcated for purposes of

trial by Order of this Court) and any subsequent appeals thereof, that the following facts are true and correct and no evidence of such stipulated facts need be offered to establish such facts:

PARTIES

1. Plaintiff City of Austin, Texas, is a municipal corporation incorporated under the laws of the State of Texas, and located in Travis County, Texas.
2. Plaintiff Lower Colorado River Authority is a conservation and reclamation district created under the laws of the state of Texas and domiciled in travis County, Texas, with its principal offices located in that county.
3. Defendant Decker Coal Company is a joint venture composed of Defendant Wytana, Inc., and Defendant Western Minerals, Inc., with its principal offices at Sheridan, Wyoming.

4. Defendant Wytana, Inc., is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in a state other than the State of Texas.

5. Defendant Western Minerals, Inc., is a corporation incorporated under the laws of the State of Oregon, having its principal place of business in a state other than the State of Texas.

CONTRACT AND PERFORMANCE

6. On October 24, 1974, Plaintiffs and Defendants entered into a Coal Purchase Contract, a true and correct copy of which together with all subsequent supplements is attached hereto and incorporated herein as Exhibit "1" (hereinafter referred to as the "Contract").

7. Pursuant to the Contract, Defendants have to date delivered considerable

amounts of coal to Plaintiffs and the Contract contemplates deliveries of considerable additional amounts of coal in the future.

FACTUAL BACKGROUND

8. On July 12, 1973, Defendants filed with the Department of State Lands of the State of Montana (hereinafter "DSL"), pursuant to Chapter 325, Session Laws of Montana, 1973, an Application for a Prospecting Permit encompassing lands where the East Decker Mine is now situated. True and correct copies of said application and a reclamation plan filed simultaneously therewith are attached hereto and incorporated herein as Exhibits "2-1" and "2-2."

9. On July 23, 1973, DSL issued to Defendants Prospecting Permit No. 00010. A

true and correct copy of said Prospecting Permit is attached hereto and incorporated herein as Exhibit "3."

10. On September 21, 1973, the DSL reissued to Defendants Prospecting Permit No. 0010, a true and correct copy of which is attached hereto and incorporated herein as Exhibit "4."

11. On September 20, 1974, the DSL renewed Defendant's Prospecting Permit, a true and correct copy of which together with all attachments, is attached hereto and incorporated herein as Exhibit "5."

12. As permitted under existing law and Exhibits "2-1" and "2-2," "3," "4" and "5" attached hereto, Defendants drilled 67 exploration holes in the Deer Creek Valley and engaged in other activities incidental thereto prior to the year 1975.

13. Prior to entering into the Contract of October 24, 1974, Plaintiffs engaged the engineering firm of Bechtel Power Corporation ("Bechtel") as a consultant. Attached as Exhibit "6" hereto and incorporated herein is a true and correct copy of a report submitted by Bechtel to Plaintiffs on October 14, 1974.

14. During the period preceding the execution of the Contract, representatives of Plaintiffs as well as representatives of Bechtel had various contacts with representatives of Defendants. Defendants supplied to Plaintiffs, through these representatives, all information requested by Plaintiffs.

15. On September 5 and 6, 1974, representatives of Plaintiffs and Bechtel visited the site of the proposed East Decker Mine in Montana. Attached

hereto and incorporated herein as Exhibits "7-1" and "7-2," respectively, are true and correct copies of (1) an excerpt from a notebook maintained by a representative of Defendants describing said visit and (2) the map which was furnished to the representatives of Plaintiffs and Bechtel at that time.

16. On October 10, 1974, Jack Reed, acting on behalf of Defendants, sent a letter to Ted Schwinden, Commissioner of DSL, informing Mr. Schwinden of Defendants' plans to apply for a coal mining permit for the East Decker site and including a proposed schedule of mine development. A true and correct copy of said letter and schedule are attached hereto and incorporated herein as Exhibits "8-1" and "8-2," respectively.

17. On April 9, 1975, Defendants filed with the DSL an application for a strip mining permit pursuant to the Montana Strip and Underground Mine Reclamation Act (Chapter 325, Session Laws of Montana, 1973). This application sought a permit for what is now commonly referred to as the East Decker Mine. A true and correct copy of relevant portions of this application is attached hereto and incorporated herein as Exhibit "9-1." As a part of said application, Defendants proposed that spoil materials from the mining operations be placed into the Deer Creek Valley, that Deer Creek be diverted from its original channel and that there would be other impacts upon the Deer Creek drainage. A more detailed description of the original East Decker Mine proposal is contained

in the Draft Environmental Impact Statement, at pages 17-49, true and correct copies of which are attached hereto and incorporated herein as Exhibit "9-2."

18. By letter dated June 24, 1975, the DSL formally notified Defendants of the results of DSL's initial review of the application for the East Decker Mine permit. A true and correct copy of said letter is attached hereto and incorporated herein as Exhibit "10."

19. By letter dated June 25, 1975, C. C. McCall, Administrator of the Reclamation Division of DSL, notified Defendants that DSL had some initial concerns relative to the East Decker Mine Permit Application, including those relating to placement of spoil material into Deer Creek and the proposed diversion of Deer Creek. A true

and correct copy of said letter is attached hereto and incorporated herein as Exhibit "11."

20. On August 1, 1975, a meeting was held in Helena, Montana, between representatives of DSL. At this meeting, representatives of Defendants submitted to DSL personnel materials dealing with the concerns expressed in DSL's letters of June 24 and 25 (Exhibits "10" and "11"). Attached hereto and incorporated herein as Exhibit "12" is a true and correct copy of a letter dated July 31, 1975, from Mr. Jack Reed which identifies the items submitted at said meeting, together with the materials submitted under item 6 of that letter.

21. By letter dated September 12, 1975, Defendants were notified by C. C. McCall of DSL that their proposed plan

involving box-cut spoilage into Deer Creek tentatively did not appear to be desirable, and that the plan should be re-examined and alternatives provided to the DSL. A true and correct copy of this letter is attached hereto and incorporated herein as Exhibit "13."

22. By letter dated September 17, 1975, Defendants were notified by C. C. McCall of the DSL that the mining and spoil deposition plans in Deer Creek were to be a topic of discussion at an upcoming meeting between Defendants and the Reclamation Division of the DSL. A true and correct copy of this letter is attached hereto and incorporated herein as Exhibit "14."

23. By letter dated September 24, 1975, Allan A. Elser and Richard N. Gregory of the State of Montana Department of Fish and Game responded to a request

from Defendants. A true and correct copy of this letter is attached hereto and incorporated herein as Exhibit "15."

24. By letter dated September 29, 1975, Richard L. Juntunen, Chief of the Strip Mining Bureau, Reclamation Division of DSL, notified Defendants that DSL was continuing to investigate alternatives to Defendants' proposals regarding the Deer Creek drainage. A true and correct copy of that letter is attached hereto and incorporated herein as Exhibit. "16."

25. On November 17, 1975, C. C. McCall of DSL sent a letter to Mr. Reed of the Defendants indicating that DSL was in the process of reviewing the reclamation plan for Deer Creek. A true and correct copy of said letter has been

attached hereto and incorporated herein as Exhibit "17."

26. A true and correct copy of an internal office memorandum dated January 19, 1976, prepared by Charles Van Hook for Dick Juntunen and C. C. McCall is attached hereto and incorporated herein as Exhibit "18."

27. A true and correct copy of a letter dated January 21, 1976, from C. C. McCall of DSL to Mr. G. Knudsen of the Montana Department of Natural Resources has been attached hereto and incorporated herein as Exhibit "19."

28. Subsequent to a February 11, 1976, meeting between representatives of DSL and Defendants, C. C. McCall of DSL notified Defendants by letter dated February 17, 1976, that the mining plan calling for the mining of and spoilage into Deer Creek and its flood

plain was unacceptable, relying as authority on Sections 9 and 10 of Chapter 325, Session Laws of Montana, 1973 (codified as 50-1042 and 50-1043, RCM 1947). A true and correct copy of said letter is attached hereto and incorporated herein as Exhibit "20."

29. On March 8, 1976, C. C. McCall visited the proposed mine site and, with other representatives of DSL and Defendants, walked along the perimeter of the Deer Creek Valley and tentatively designated a "non-disturbance" line, under the authority stated in the February 17, 1976, letter attached hereto as Exhibit "20."

30. By letter dated March 19, 1976, C. C. McCall of the DSL confirmed in writing the "non-disturbance" line which he had established on March 8, 1976, beyond which no disturbances of the

Deer Creek Valley should take place. A true and correct copy of said letter is attached hereto and incorporated herein as Exhibit "21."

31. After several meetings between Defendants and representatives of DSL including the field inspection on March 8, 1976, the DSL reaffirmed its objections to spoiling into the Deer Creek Valley and requested that Defendants modify their proposed mining plan to provide for maximum feasible recovery of coal resources without spoiling into the Deer Creek Valley.

32. In response, Defendants established a task force to generate and consider possible alternatives. That group tentatively submitted to the DSL for consideration three alternative mining methods, referred to as B-1, B-2 and B-3. These three plans are described

in more detail in the Draft Environmental Impact Statement, at pages 639 through 660, true and correct copies of which are attached hereto and incorporated herein as Exhibit "22."

33. After additional analysis of these three preliminary proposals in terms of economics and mining convenience, Defendants determined that Plan B-3 was the most favorable alternative. Defendants then filed with DSL a formal Mine and Reclamation Plan Modification on August 11, 1976, incorporating the B-3 plan. A true and correct copy of the relevant portions of said filing are attached hereto and incorporated herein as Exhibit "23."

34. By letter dated April 5, 1977, C. C. McCall established final boundaries of the Deer Creek "non-disturbance" line. A true and correct copy of said letter

is attached hereto and incorporated herein as Exhibit "24-1." Attached hereto and incorporated herein as Exhibit "24-2" is a map showing the approximate location of that "non-disturbance" or "non-infringement" line.

35. On July 13, 1977, the DSL approved Defendants' Application for Mining Permit, as modified, for the East Decker Mine pursuant to Chapter 325, Session Laws of Montana, 1973, as amended. The mining plan approved in connection with said Permit is contained in Exhibit "23" above. A true and correct copy of the relevant portions of said mining permit as issued by DSL is attached hereto and incorporated herein as Exhibit "25."

36. After receiving approval of the Application for Mining Permit as described

in Stipulation Number 35, Defendants proceeded to open and operate the East Decker Mine in accordance with such permit and to deliver coal under the Contract to Plaintiffs. The mining costs under such permit are higher than such costs would have been under the original application described in Stipulation Number 17, above. These increased mining costs result from the refusal of DSL to permit Defendant to mine or place spoil materials in the Deer Creek Valley.

LAWS AND REGULATIONS

37. Attached hereto as Exhibit "26" is a true and correct copy of Chapter 325, Session Laws of Montana, 1973, as enacted and approved on March 16, 1973. This Act was originally codified in Title 50, Chapter 10, RCM 1947 (Section 50-1034, et seq.), and is

currently codified as MCA, 1979, Section 82-4-201, et seq.

38. Attached hereto as Exhibits "27-1," "27-2," "27-3," "27-4," "27-5," "27-6," "27-7" and "27-8" are true and correct copies of all amendments to said Chapter 325, Session Laws of Montana, 1973, through July 13, 1977.

39. Attached hereto as Exhibit "28" is a true and correct copy of the DSL regulations promulgated under said Chapter 325, Session Laws of Montana, 1973. These regulations became effective on September 5, 1973.

40. The laws and published regulations referred to in Stipulations Numbers 37, 38 and 39 were the only laws and published regulations relied upon by DSL for the determinations made or the actions taken by DSL referred to in these stipulations.

SIGNED this 1st day of May, 1981.

OFFICE OF THE CITY ATTORNEY
P.O. Box 1088
Austin, Texas 78767

By_____
Terry Irion

ATTORNEYS FOR THE CITY OF
AUSTIN, TEXAS

SMALL, CRAIG & WERKENTHIN
2600 Austin National Bank Tower
Austin, Texas 78701
512-472-8355
By_____
Jim Alsup

ATTORNEYS FOR LOWER
COLORADO RIVER AUTHORITY

BROWN, MARONEY, ROSE,
BAKER & BARBER
1300 American Bank Tower
Austin, Texas 78701

Dennis P. Christianson
Peter Kiewit Sons', Inc.
1000 Kiewit Plaza
Omaha, Nebraska 68131

HOLLAND & HART
P.O. Box 8749
Denver, Colorado 80201

By_____
Britton White, Jr.
ATTORNEYS FOR DEFENDANTS

APPENDIX H

Additional Stipulations, dated November 24, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CITY OF AUSTIN, TEXAS and LOWER COLORADO RIVER AUTHORITY	§	
VS.	§	CIVIL ACTION No. A-79-CA-287
DECKER COAL COMPANY, a Joint Venture, WYTANA, INC., and WESTERN MINERALS, INC.	§	

ADDITIONAL STIPULATIONS

Come now Plaintiffs City of Austin, Texas, and Lower Colorado River Authority and Defendants Decker Coal Company; Wytana, Inc.; and Western Minerals, Inc., by and through their respective attorneys, and hereby stipulate, for purposes of trial of the damage portion of the above styled and numbered cause and any subsequent appeals thereof, that the following fact is true and correct and no evidence

of such stipulated fact need be offered to establish such fact:

1. In the event of a finding in favor of Plaintiffs City of Austin, Texas, and Lower Colorado River Authority, total damages to be awarded Plaintiffs shall be Ten Million One Hundred Seven Thousand Seven Hundred Twelve and 27/100 Dollars ($10,107,712.27), comprised of a principal amount of Eight Million Four Hundred Twenty-Nine Thousand Three Hundred Eighty-Seven and 08/100 Dollars ($8,429,387.08), plus prejudgment interest thereon of One Million Six Hundred Seventy-Eight Thousand Three Hundred Twenty-Five and 19/100 Dollars ($1,678,325.19).

This stipulation is conditioned upon a finding of the Court in favor of the Plaintiffs on the liability issues previously submitted to the Court.

The parties further agree to waive, and do hereby waive any and all hearings or trials on the issue of damages in the event that the Court finds for Plaintiffs on the liability issues. The parties expressly agree and authorize the Court, in the event that it finds for Plaintiffs on the liability issues, to enter judgment for Plaintiffs in the above stipulated amount without further hearings or trial. It is understood and agreed by the parties that this waiver herein shall not operate to waive any hearing or trial as to the damages claimed by either party in the event that the trial court's judgment is reversed on appeal.

Nothing contained herein shall operate as a waiver of any of Defendants' post-judgment rights, including specifically but not limited to Defendants' rights to move to amend such findings of fact and conclusions of law as the Court may make and to move for a new trial on the liability issues. Neither shall anything contained herein operate as a waiver of right of the Defendants to challenge by appeal the decision of the trial court on issues of liability, and the Defendants expressly reserve all available rights to appeal any such decision on the issue of liability.

SIGNED and agreed to on this 24th day of November, 1981.

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
P.O. Box 1088
Austin, Texas 78767

By_____
Terrence Lang Irion

ATTORNEYS FOR THE CITY OF AUSTIN, TEXAS

SMALL, CRAIG & WERKENTHIN
2600 Austin National Bank Tower
Austin, Texas 78701
512-472-8355

By_____
Jim Alsup

ATTORNEYS FOR LOWER COLORADO RIVER AUTHORITY

Dennis P. Christianson
Peter Kiewit Sons', Inc.
1000 Kiewit Plaza
Omaha, Nebraska 68131

HOLLAND & HART
P.O. Box 8749
Denver, Colorado 80201

BROWN, MARONEY, ROSE,
BAKER & BARBER
1300 American Bank Tower
Austin, Texas 78701

ATTORNEYS FOR DEFENDANTS

No. 83-390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CITY OF AUSTIN, TEXAS, AND
LOWER COLORADO RIVER AUTHORITY,

Petitioners,

v.

DECKER COAL COMPANY, A JOINT VENTURE,
WYTANA, INC., AND WESTERN MINERALS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

BRITTON WHITE, JR.
(Counsel of Record)
PAUL D. PHILLIPS
HOLLAND & HART
2900 Anaconda Tower
555 Seventeenth Street
Denver, Colorado 80202
(303) 575-8000
Attorneys for Respondents

Of Counsel:

DENNIS P. CHRISTIANSON
PETER KIEWIT SONS', INC.
1000 Kiewit Plaza
Omaha, Nebraska 68131

QUESTION PRESENTED FOR REVIEW

Whether, under Montana law, the Court of Appeals for the Fifth Circuit properly interpreted the term "regulation" as used in a contract between petitioners and respondents.*

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* Pursuant to SUP. CT. R. 28.1, the parent companies, subsidiaries, and affiliates of the named Respondent Corporations are as follows: Peter Kiewit Sons', Inc. and Pacific Power & Light Co.

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Respondents Decker Coal Company, *et al.* disagree in several respects with petitioners' statement of the case; however, these differences do not appear relevant to the question of whether certiorari is granted. Accordingly, for purposes of this Brief in Opposition only, respondents accept petitioners' statement of the case.

SUMMARY OF ARGUMENT

Petitioners seek certiorari from the decision of the U.S. Court of Appeals for the Fifth Circuit in *City of Austin v. Decker Coal Co.*, 701 F.2d 420 (5th Cir. 1983), construing the terms of a coal supply contract between the parties. However, petitioners have failed to demonstrate that this case is worthy

of the attention of the Supreme Court. None of the considerations set forth in Supreme Court Rule 17 are present. The case is a diversity proceeding involving nothing more than the construction of a contract under Montana law, which was correctly and equitably construed by the Court of Appeals.

ARGUMENT

I. None of the Recognized Bases for Certiorari are Present in This Case.

The Petition for Certiorari fails to mention Supreme Court Rule 17, for the telling reason that none of the recognized bases for certiorari set forth in that Rule are present in this case. This is a contract dispute which presents no federal question; no conflict among the circuits; no departure from accepted judicial proceedings; nor any other significant issue warranting an exercise of this Court's discretionary power of certiorari.

As the parties stipulated and both courts below agreed, the case was governed by Montana state law. The Court of Appeals merely applied Montana's statutes and rules of contract interpretation to construe a private contract. Faced with a burgeoning caseload, this Court is understandably disinclined to grant certiorari where the only issue is an alleged misinterpretation or conflict with state law.[1] For example, in *Butner v. United States*, 440 U.S. 48, 57-58 (1979), four federal judges had divided evenly over a state law question, just as occurred in this case. Nevertheless, the Court stated emphatically that "[w]e did not grant certiorari

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1. In 1980, the Supreme Court dropped from the list of recognized grounds for certiorari instances in which an appeals court has decided "an important state . . . question in a way in conflict with applicable state . . . law." Sup. Ct. R. 19(1)(b), 42 F.R.D. 94 (1967). "Its deletion suggests, at the least, a diminished interest on the Court's part in reviewing diversity of citizenship cases where the only issue is an alleged conflict with applicable state law." Boskey & Gressman, *The Supreme Court's New Rules For The Eighties*, 85 F.R.D. 487, 505 (1980).

to decide whether the Court of Appeals correctly applied [state] law." *Id.* at 51.

Petitioners presented all of the arguments now made in the Petition for Certiorari to the Fifth Circuit in a Petition for Rehearing and Suggestion for Rehearing *En Banc*. None of the thirteen Fifth Circuit judges who reviewed those pleadings — including the judge who dissented from the majority's decision — considered this case worthy of rehearing by the Circuit Court. 705 F.2d 1448 (5th Cir. 1983). Neither does it merit an exercise of the Supreme Court's discretionary power of certiorari.

II. The Financial Impact of This Case Has Been Greatly Exaggerated by Petitioners and is Not Relevant to the Granting of Certiorari.

Petitioners have speculated that the impact upon them of the decision below may be as much as $350 million dollars. Even a cursory perusal of the Fifth Circuit's opinion, however, makes it clear that the court below expressly rendered no decision whatsoever as to the amount of the cost reimbursement which petitioners may ultimately be required to pay. 701 F.2d at 431. The opinion below consisted of only a legal determination that the parties intended a certain kind of increased mining cost to be added to the price of the coal. The magnitude of such cost reimbursements, if any, remains to be determined in a factual hearing before the trial court.

In fact, the maximum cost reimbursement to which respondents may be entitled in this case is (in present day dollars) less than one-fourth of petitioners' inflated $350 million dollar figure. More significantly, whatever cost reimbursement is deemed recoverable will be spread out over the entire 26-year term of the contract, and presumably will be apportioned among the millions of utility customers served by petitioners, which places in proper perspective the financial impact of this case. The hue and cry raised by petitioners regarding the "public" importance of this case is largely illusory.

The nature of the contract between the parties also bears mention. That contract provides for the mining, delivery and purchase of more than 50 million tons of coal over a period extending well into the 21st century. There have already been numerous uncontested cost increases passed through to petitioners, and the total economic value of the contract today exceeds $1 billion dollars, even if no further cost increases occur. Viewed in this light, the cost reimbursements sought by respondents are neither extreme nor unreasonable, but simply reflect the magnitude of the underlying contract.

Finally, as noted, respondents' entitlement to such price reimbursements was not finally established by the decision below and must await an additional factual hearing. Petitioners' present attempt to quantify these increases is therefore nothing more than speculation.

III. This Case Has Neither Sufficient Significance Nor Broad Enough Impact to Warrant Granting Certiorari.

The decision below affects only the parties to a single contract, despite petitioners' efforts to characterize its impact as more far-reaching. This case will not predetermine the manner in which any other contracts are construed — even those involving similar language and one or more of the same parties. To the extent that these other contracts may require interpretation, this will be done by different courts applying different state laws and evaluating each contract on its own merits.

It is therefore quite possible that entirely different interpretations will legitimately be applied to other contracts, notwithstanding superficial similarities to the agreement construed by the court below. Moreover, if other courts should choose to give some weight to the opinion below, that will not be because it is a binding precedent, but rather because the careful analysis and reasoning of the majority are persuasive.

In sum, a decision by the Supreme Court in this case would not establish any guiding precedent and would not resolve any important legal issues. The Court would simply

be interpreting a particular coal supply contract between discrete parties.

IV. The Decision of the Court Below is Equitable and Reasonable.

Petitioners have attempted to characterize the Fifth Circuit's decision as unfair because any cost reimbursements ultimately allowed to respondents will be spread among more than a million consumers of electrical power and because a potential has been created for additional future cost reimbursements of a similar nature.

These arguments disregard the Fifth Circuit's finding that the parties intentionally agreed to allocate the very category of costs at issue in exactly this manner. Indeed, it would be manifestly unfair and unreasonable if, as petitioners now argue, such cost increases were to be imposed upon the sellers of the coal.

As the terms of the contract make clear, the parties intended to create a business relationship, typical in the mining industry, whereby the utility companies buying the coal obtained a long-term (26 year), dependable source of energy, while the mining company selling the coal received comprehensive assurances that all increased mining costs arising after a base date could be passed through to the buyers. Any other interpretation would frustrate the basic purpose of the contract, because the costs of mining the coal would inevitably exceed the base price and coal production would necessarily come to a halt. In this context, the court below properly concluded that a state administrative agency's discretionary exercise of delegated statutory authority to ban mining in a particular area constituted "regulation" as that term was used by the parties in their contract.

V. Summary.

Reduced to its basic elements, this case presents nothing more than the interpretation of a contract under Montana law. Petitioners' attempt to inflate its importance by refer-

ring to large dollar amounts is speculative and somewhat misleading, given the pending factual hearing on what (if any) reimbursement for increased mining costs is due to respondents. It is simply not the type of case which deserves this Court's attention.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

BRITTON WHITE, JR.
(Counsel of Record)
PAUL D. PHILLIPS
HOLLAND & HART
P. O. Box 8749
2900 Anaconda Tower
555 Seventeenth Street
Denver, Colorado 80201
Telephone: (303) 575-8000
Attorneys for Respondents Decker Coal Company, et al.

Of Counsel:

DENNIS P. CHRISTIANSON
PETER KIEWIT SONS', INC.
1000 Kiewit Plaza
Omaha, Nebraska 68131